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ALEXANDER L. STEVAS,
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Nos. 82-1453 and 82-1509

IN THE

Supreme Court of the United States

October Term, 1983

ERNEST BADARACCO, SR., *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DELEET MERCHANDISING CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed March 11, 1983
Certiorari Granted May 16, 1983

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ERNEST BADARACCO, SR., *et al.*,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PAPERS IN BADARACCO PROCEEDING.

Petition.

The above-named petitioners hereby petition for a redetermination of the deficiency in tax and the addition to the tax as set forth by the Commissioner of Internal Revenue in his statutory notice dated November 21, 1977, and as a basis for their proceeding allege as follows:

1. The petitioners reside at 403 Washington Street, Hoboken, New Jersey.

2. The tax return for the taxable year 1964 was timely filed.

3. The statutory notice (a copy of which is attached to this petition) was mailed to these petitioners on November 21, 1977.

4. The tax and additions to the tax which are in controversy are as follows:

Year	*Tax Deficiency*	*Addition to the Tax Sec. 6653(b), I.R.C. of 1954*
1964	$21,072.39	$10,536.20
1965	18,453.48	9,226.74
1966	19,996.21	9,998.11
1967	39,824.89	19,912.45
1968	49,832.86	24,916.43
1969	54,350.88	27,175.44

5. The determination of the respondent set forth in the statutory notice is based upon the following errors:

(a) The respondent has erroneously determined that for the taxable year 1964 the gross receipts of the partnership, Badaracco Bros. and Co. was understated in the amount of $67,110.50, and that consequently the petitioner, Ernest Bodaracco, understated his taxable income for the taxable year 1964 in the amount of $33,555.25.

(b) The amounts of the deficiencies for each of the taxable years 1965 to 1969 inclusive, upon which respondent has based the application of the addition to the tax under section 6653(b), *supra,* are incorrect.

(c) The respondent has erroneously determined the application of the addition to the tax as against the petitioner, Ernest Bodaracco, under section 6653(b), *supra,* for each of the taxable years 1964 to 1967, inclusive.

(d) The respondent has erroneously determined the existence of a deficiency in tax with respect to the taxable year 1964 in that said year is barred by reason of the application of Section 6501(a) of the Internal Revenue Code of 1954.

(e) The respondent has erroneously determined the existence of deficiencies in tax for each of the taxable years 1964 to 1969, inclusive, as against the petitioner, Rose Badaracco, in that he has failed to accord said petitioner the benefit of section 6013(e) of the Internal Revenue Code of 1954.

6. The facts upon which petitioners rely as a basis for this appeal are as follows:

Petition

(a) The petitioners did not fail to accurately report all of their taxable income for the taxable year 1964 to the best of their knowledge at the time of filing their return for said year.

(b) The employment of the bank deposit method by the respondent in reconstructing taxable income for the taxable year 1964 distorts the taxable income of the aforesaid partnership in that consideration has not been given to sums available from non-taxable sources.

(c) Petitioners filed amended returns for the taxable years 1965 to 1969, inclusive. When said returns were prepared and filed, errors were made with respect to taxable income. A more recent analysis of taxable income of the aforesaid partnership for said taxable years reconstructs less income than reported, which petitioners desire to present to this Court. Said revised income figures would also affect the computation of the addition to the tax under section 6653(b), *supra*.

(d) There was no intent on the part of the petitioner, Ernest Badaracco to wilfully evade or defeat payment of tax for any of the taxable years 1964 to 1969, inclusive.

(e) The tax return of the petitioner for the taxable year 1964 was timely filed and petitioners have not executed extensions of time with respect thereto as provided in section 6501(c)(4) of the Internal Revenue Code of 1954.

(1) By reason of the application of section 6501(a), *supra*, the time for assessment with respect to said year would have expired on April 15, 1968.

(2) The statutory notice of deficiency with respect to said year was not mailed to petitioners until November 21, 1977, which mailing was beyond the applicable three year statute of limitations set forth in section 6501(a), *supra.*

(f) The petitioner, Rose Badaracco, when she signed the joint returns for the taxable years in issue, did not have reason to know of any alleged omissions from gross income. Furthermore, said petitioner, Rose Badaracco, has never significantly benefited either directly or indirectly from any alleged omissions.

WHEREFORE, the petitioners pray that this Court may hear this proceeding and determine that respondent erred in determining additional tax due from these petitioners for the taxable year 1964; that respondent has erroneously determined additions to the tax for each of the taxable years in issue under section 6653(b), *supra;* that the amount of the tax shown upon the amended returns was erroneously computed; that the provisions of 6501(a), *supra,* are applicable to bar the assessment for the taxable year 1964; that in any event the petitioner, Rose Badaracco, is entitled to the relief provisions of section 6013(e), *supra;* and, for such other relief in the premises as this Court may determine proper.

Dated: February 16, 1978

EDWIN FRADKIN
JOHN J. O'TOOLE
BRUCE E. GOLDMAN
STARR, WEINBERG AND FRADKIN
744 Broad Street
Newark, New Jersey 07102
(201) 623-5346

Notice of Deficiency, Attached to Petition.

INTERNAL REVENUE SERVICE

DISTRICT DIRECTOR

Department of the Treasury

P.O. Box 270, Newark, N.J. 07101

Date: Nov 21 1977

Tax Year Ended and Deficiency: and

Addition To The Tax	
December 31, 1964	$31,608.59
December 31, 1965	$ 9,226.74
December 31, 1966	$ 9,998.11
December 31, 1967	$19,912.45
December 31, 1968	$23,920.61
December 31, 1969	$27,114.00

Person to Contact:

Mr. Davenport

Contact Telephone Number:

201-645-2350

See Attached Schedule

Notice of Deficiency, Attached to Petition

Mr. Ernest Badaracco, Sr. and
Mrs. Rose Badaracco
403 Washington Street
Hoboken, New Jersey 07030

Certified Mail

Dear Mr. and Mrs. Badaracco:

We have determined that there is a deficiency in your income tax as shown above. This letter is a NOTICE OF DEFICIENCY sent to you as required by law. The enclosed statement shows how we computed the deficiency.

If you wish to contest this deficiency in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the amount of your tax. The petition should be filed with the United States Tax Court, 400 Second Street NW., Washington, D.C. 20217, and the copy of this letter should be attached to the petition. The time in which you must file a petition with the Court (90 or 150 days as the case may be) is fixed by law and *the Court cannot consider your case if your petition is filed late.* If this letter is addressed to both a husband and wife, and both want to petition the Tax Court, *both* must sign the petition or each must file a separate, signed petition.

If you decide not to file a petition with the Tax Court, we would appreciate it if you would sign and return the enclosed Statutory Notice Statement-Waiver. This will permit us to assess the deficiency quickly and will limit the accumulation of interest. The enclosed self-addressed envelope is for your convenience. If you decide not to sign and return the statement and you do not timely petition

the Tax Court, the law requires us to assess and bill you for the deficiency after 90 days from the above mailing date of this letter (150 days if this letter is addressed to you outside the United States).

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

JEROME KURTZ
Commissioner
By CORNELIUS J. COLEMAN
District Director

Enclosures:
Copy of this letter
Statement-Waiver
Envelope

rw Letter 892(DO) (6-77)

Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco

Schedule of Deficiencies And Additions To Tax

Year	*Deficiency*	*Fraud Addition Section 6653(b) IRC*	*Failure To Pay Tax Addition Section 6654 IRC*
December 31, 1964	$21,072.39	$10,536.20	0
December 31, 1965	0	9,226.74	0
December 31, 1966	0	9,998.11	0
December 31, 1967	0	19,912.45	0
December 31, 1968	0	24,916.43	(995.82)
December 31, 1969	0	27,175.44	(61.44)

Notice of Deficiency, Attached to Petition

DD/Newark

Form 4089 (Rev. June 1977)	Department of the Treasury – Internal Revenue Service Statutory Notice Statement - Waiver	Symbols AM:CC:90

Name and Address of Taxpayer(s)

Mr. Ernest Badaracco, Sr. and
Mrs. Rose Badaracco
403 Washington Street
Hoboken, New Jersey 07030

Kind of Tax: Income

[X] Copy to Authorized Representative
Starr, Weinberg and Fradkin
744 Broad Street
Newark, New Jersey 07102

Taxable Year Ended	Increase in Tax	Deficiency Fraud Addition Section 6653(b) IRC	Failure to Pay Addition Section 6654 IRC
December 31, 1964	$21,072.39	$10,536.20	-0-
December 31, 1965	-0-	9,226.74	-0-
December 31, 1966	-0-	9,998.11	-0-
December 31, 1967	-0-	19,912.45	-0-
December 31, 1968	-0-	24,916.43	($995.82)
December 31, 1969	-0-	27,175.44	(61.44)

See the attached explanation for the above deficiencies

I consent to the immediate assessment and collection of the deficiencies (increase in tax and penalties) shown above, plus any interest provided by law.

Your Signature ▶ ..... (Date signed)

Spouse's Signature, If A Joint Return Was Filed ▶ ..... (Date signed)

Taxpayer's Representative Sign Here ▶ ..... (Date signed)

Corporate Name: .....

Corporate Officers Sign Here ▶ ..... (Signature) (Title) (Date signed)

▶ ..... (Signature) (Title) (Date signed)

Note:

If you consent to the assessment of the amounts shown in this waiver, please sign and return it in order to limit the accumulation of interest and expedite our bill to you. Your consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are entitled to a refund; nor prevent us from later determining, if necessary, that you owe additional tax; nor extend the time provided by law for either action.

If you later file a claim and the Internal Revenue Service disallows it, you may file suit for refund in a district court or in the United States Court of Claims, but you may not file a petition with the United States Tax Court.

Who Must Sign

If this waiver is for any year(s) for which you filed a joint return, both you and your spouse must sign the original and duplicate of this waiver form unless one of you, acting under a power of attorney, signs as agent for the other.

This waiver may be signed by your attorney or agent, provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

If this waiver is signed by a person acting in a fiduciary capacity (such as executor, administrator, trustee), Form 56, Notice of Fiduciary Relationship, should, unless previously filed, accompany this form.

If this waiver is for a corporation, it must be signed with the corporate name followed by the signature and title of the officer(s) authorized to sign.

If you agree, please sign one copy and return it; keep the other copy for your records.

Notice of Deficiency, Attached to Petition

Mr. Ernest Bardaracco, Sr. and
Mrs. Rose Bardaracco

Form 4089—Continued

All or part of the underpayment of tax required to be shown on the returns for the tax years December 31, 1964, December 31, 1965, December 31, 1966, December 31, 1967, December 31, 1968 and December 31, 1969, is due to fraud. Consequently, the 50 percent addition to the tax is charged for each of those years, as provided by section 6653(b) of the Internal Revenue Code. Since no part of the underpayment is due to fraud on the part of Rose Badaracco, this addition to the tax does not apply to her.

Since the fraud addition is being assessed under section 6653(b), the failure to pay tax addition previously assessed will be abated.

Notice of Deficiency, Attached to Petition

Form 5278 (January 1975)	Department of the Treasury - Internal Revenue Service Statement - Income Tax Changes	Return Form No. 1040	Schedule No.

Name of Taxpayer(s)

Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco

☒ Notice of Deficiency ☐ Other (specify)

☐ Settlement Computation

	Tax Years Ended		
	December 31, 1964	**December 31, 1965**	**December 31, 1966**
1. Adjustments to income			
a. **Partnership Income - Badaracco Bros.**	**33,555.25**	**-0-**	**-0-**
b.			
c.			
d.			
e.			
f.			
g.			
2. Total adjustments	**33,555.25**	**-0-**	**-0-**
3a. ☒ Taxable income ☐ Adjusted gross income b. As shown in: ☐ Preliminary letter dated _____ ☐ Notice of deficiency dated _____ ☒ Return as filed	**73,678.96**	**122,830.50**	**121,283.70**
4. ☒ Taxable income as revised ☐ Adjusted gross income as revised	**107,234.21**	**122,830.50**	**121,283.70**
5. Tax	**52,654.58**	**59,391.52**	**58,401.57**
6. Alternative tax if applicable (from page _____)			
7. Tax surcharge			
8. Corrected tax liability (Lesser of line 5 or 6, plus line 7)	**52,654.58**	**59,391.52**	**58,401.57**
9. Less credits (specify) a. **Dividends Received Credit**	**168.07**		
b. **Investment Tax Credit**	**72.60**	**46.86**	**8.93**
c.			
10. Balance (line 8 less amounts on lines 9a through 9c)	**52,413.91**	**59,344.66**	**58,392.64**
11. Plus a. Tax from recomputing prior year investment credit			
b. Self-employment tax	**239.20**	**239.20**	**405.90**
c.			
12. Total corrected income tax liability (line 10 plus amounts on lines 11a through 11c)	**52,673.11**	**59,603.86**	**58,798.54**
13. Total tax shown on return or as previously adjusted	**31,600.72**	**59,603.86**	**58,798.54**
14. Statutory deficiency or overassessment (difference between lines 12 and 13)	**21,072.39**	**-0-**	**-0-**
15. Additions to the tax (listed below) **Fraud Addition - Section 6653(b) IRC**	**10,536.20**	**9,226.74**	**9,998.11**

Notice of Deficiency, Attached to Petition

Form 5278 (January 1975)	Department of the Treasury - Internal Revenue Service Statement - Income Tax Changes	Return Form No. 1040	Schedule No.

Name of Taxpayer(s):

Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco

☒ Notice of Deficiency ☐ Other (specify)

☐ Settlement Computation

	Tax Years Ended		
	December 31, 1967	December 31, 1968	December 31, 1969
1. Adjustments to income			
a.			
b.			
c. NONE			
d.			
e.			
f.			
g.			
2. Total adjustments	-0-	-0-	-0-
3a. ☒ Taxable income ☐ Adjusted gross income b. As shown in: ☐ Preliminary letter dated ____ ☐ Notice of deficiency dated ____ ☒ Return as filed	139,932.03	183,297.93	168,649.81
4. ☒ Taxable income as revised ☐ Adjusted gross income as revised	139,932.03	183,297.93	168,649.81
5. Tax	83,535.14	99,455.57	89,461.87
6. Alternative tax if applicable (from page ____)			
7. Tax surcharge		7,459.17	8,946.19
8. Corrected tax liability (Lesser of line 5 or 6, plus line 7)	83,535.14	106,914.74	98,408.06
9. Less credits (specify) a. Investment Tax Credit	94.93	119.72	
b.			
c.			
10. Balance (line 8 less amounts on lines 9a through 9c)	83,440.21	106,795.02	98,408.06
11. Plus a. Tax from recomputing prior year investment credit		46.28	
b. Self-employment tax	422.40	499.20	538.20
c.			
12. Total corrected income tax liability (line 10 plus amounts on lines 11a through 11c	83,862.61	107,340.50	98,946.26
13. Total tax shown on return or as previously adjusted	83,862.61	107,340.50	98,946.26
14. Statutory deficiency or overassessment (difference between lines 12 and 13)	-0-	-0-	-0-
15. Additions to the tax (listed below)			
Fraud Addition - Section 6653(b) IRC	19,912.45	24,916.43	27,173.44
Failure To Pay Tax Addition - Section 6651 IRC		(995.82)	(61.44)

Notice of Deficiency, Attached to Petition

FORM 886-A (REV. APRIL 1960)	EXPLANATION OF ITEMS	SCHEDULE NO. OR EXHIBIT
NAME OF TAXPAYER		YEAR/PERIOD ENDED
Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco		December 31, 1964-1969

Partnership Income

Your share of Badaracco Bros. and Co. partnership income for the year 1964 is $90,911.66 in lieu of $57,156.19 as reported on your return. Therefore, your taxable income is increased $33,755.25 under section 61 of the Internal Revenue Code.

See below for explanation of your share of the partnership adjustment:

a. Gross Receipts - 1964 (Badaracco Bros & Co.)

Per Return	$865,984.41
Per Credit	933,094.91
Adjustment	$ 67,110.50

Gross Receipts increased as follows:

1. Deposits into checking account #020-023489-5 Hudson County, National Bank - Not part of books and records	$55,580.31
2. Hudson County Boulevard Commission checks cashed	9,104.05
3. Hudson County Boulevard Commission checks used in payment of Notes Payable	2,126.14
Total Increase in Gross Receipts-(See Schedule I)	$67,110.50
X your percentage interest	50%
Increase in your income	$33,555.25

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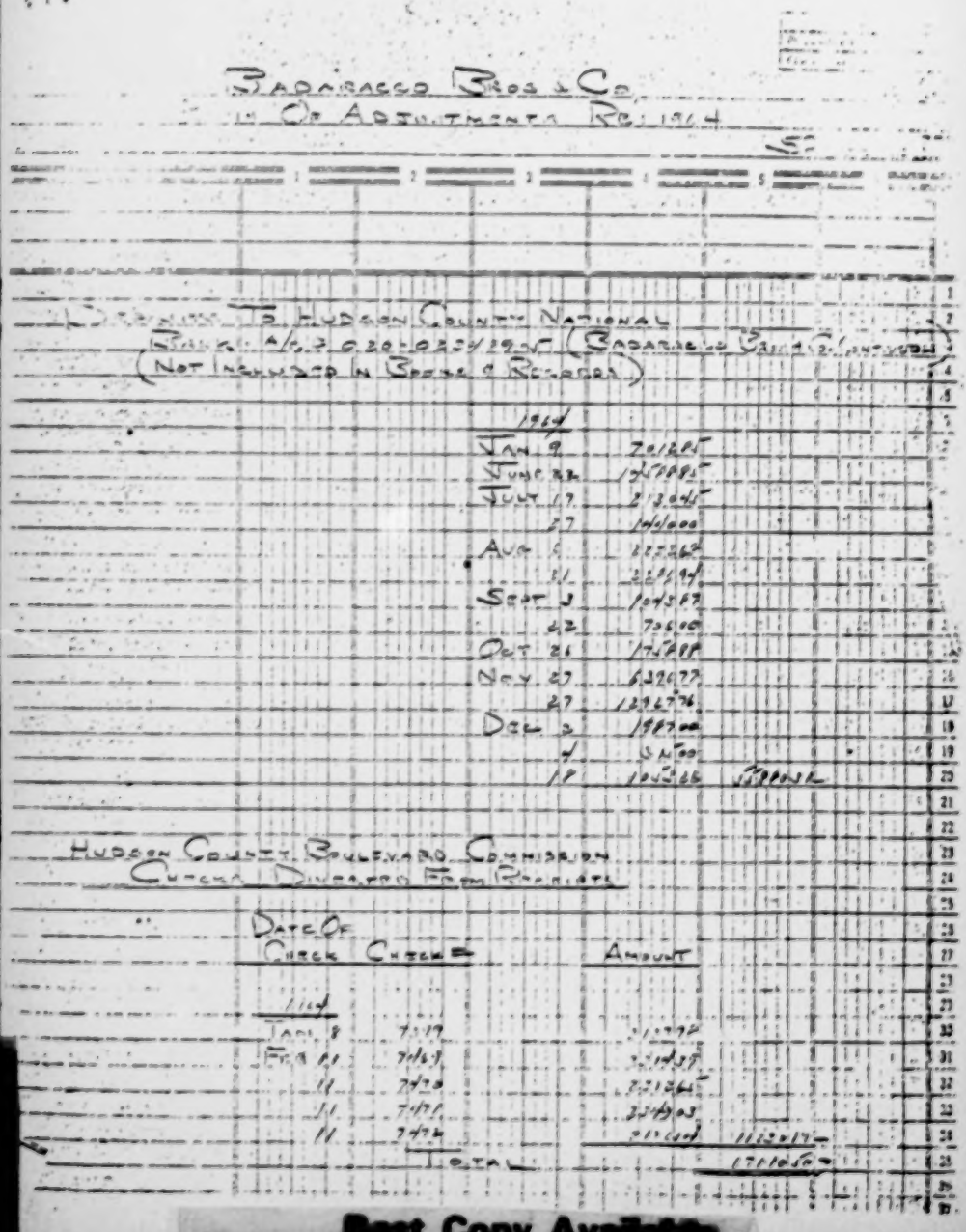
Notice of Deficiency, Attached to Petition



Badanasco Bros & Co.
In Re Adjustments For 1964

Deposits To Hudson County National Bank A/C 2 20-10-2324-27 (Badanasco Bros & Co. Hudson
(Not Included In Sworn Statement)

1964		
Jan 9	20,120.00	
June 22	10,000.00	
June 17	2,130.00	
27	10,000.00	
Aug 6	10,000.00	
11	2,000.00	
Sept 3	10,000.00	
22	7,000.00	
Oct 26	10,000.00	
Nov 27	6,320.00	
27	12,967.76	
Dec 2	10,000.00	
4	3,400.00	
18	10,000.00	Withdrawal

Hudson County Boulevard Commission
Checks Deducted From Receipts

Date Of Check	Check #	Amount	
1964			
Jan 8	7117	1,000.00	
Feb 21	7163	2,000.00	
11	7170	2,000.00	
11	7171	30,000.00	
11	7174	100,000.00	135,000.00
	Total		170,000.00

Best Copy Available

Notice of Deficiency, Attached to Petition

FORM 886-A (REV. APRIL 1958)	EXPLANATION OF ITEMS	SCHEDULE & NO. OR EXHIBIT
NAME OF TAXPAYER		YEAR/PERIOD ENDED
Mr. Ernest Badaracco, Sr. and Mrs. Rose Badaracco		December 31, 1964-1969

Fraud Addition

All or part of the underpayment of tax required to be shown on the returns for the tax years December 31, 1964, December 31, 1965, December 31, 1966, December 31, 1967, December 31, 1968 and December 31, 1969 is due to fraud. Consequently, the 50 percent addition to the tax is charged for each of those years, as provided by section 6653(b) of the Internal Revenue Code. Since no part of the underpayment is due to fraud on the part of Rose Badaracco, this addition to the tax does not apply to her.

See Below for computation:

	Fraud Addition
1964 - 50% of $21,072.39 (Form 5278, Line 14)	$10,536.20
1965 - 50% of additional tax due per amended return - $18,453.48	9,226.74
1966 - 50% of additional tax due per amended return - $19,996.21	9,998.11
1967 - 50% of additional tax due per amended return - $39,824.89	19,912.45
1968 - 50% of additional tax due per amended return - $49,832.86	24,916.43
1969 - 50% of additional tax due per amended return - $54,350.88	27,175.44

Failure To Pay Tax Addition

Since the fraud addition is being assessed under section 6653(b) of the Internal Revenue Code failure to pay tax addition previously assessed will be abated as shown below:

1968 - Decrease in failure to pay tax addition	$995.82
1969 - Decrease in failure to pay tax addition	41.44

Best Copy Available

Answer.

The Respondent, in answer to the petition filed in the above-entitled case, admits, denies and alleges as follows:

1. through 3. Admits the allegations of paragraph 1. through 3. of the petition.

4. Denies the allegations of paragraph 4. of the petition; alleges that the deficiencies in income tax and addition to the tax under I.R.C. §6653(b) in dispute for the years 1964 through 1969 are as follows:

	Deficiency	
Year	*Income Tax*	*Addition to the Tax I.R.C. §6653(b)*
1964	$21,072.39	$10,536.20
1965	—	$ 9,226.74
1966	—	$ 9,998.11
1967	—	$19,912.45
1968	—	$24,916.43
1969	—	$27,175.44

5. (a) through (e) Denies the allegations of subparagraphs (a) through (e) of paragraph 5. of the petition.

6. (a) through (d) Denies the allegations of subparagraphs (a) through (d) of paragraph 6. of the petition.

(e), (e) (1), and (e) (2) Admits the allegations of subparagraphs (e), (e) (1) and (e) (2) of paragraph 5. of the petition.

Answer

(f) Denies the allegations of subparagraph (f) of paragraph 5. of the petition.

7. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

8. FURTHER ANSWERING the petition and in support of the determination that all or part of the underpayments of tax required to be shown on petitioners' income tax returns for the taxable years 1964 through 1969 are due, in whole or in part, to fraud, the respondent alleges:

(a) During the taxable years 1964 through 1969, Ernest Badaracco, Sr., hereinafter petitioner, was an equal partner in Badaracco Brothers & Co. (hereinafter Partnership).

(b) Petitioner caused the Partnership to maintain false and fraudulent books of account and records of the Partnership income essential for the determination of petitioners' correct taxable income liability for the years 1964 through 1969.

(c) Petitioner knew that the books and records of the Partnership were false and fraudulent for the years 1964 through 1969.

(d) For the taxable years 1964 through 1969 petitioner caused the Partnership to file federal income tax returns which failed to report income received as follows:

1964	$ 67,110.50
1965	$ 61,211.80
1966	$ 65,032.46

1967	$127,737.59
1968	$140,033.76
1969	$155,477.17

(e) For the taxable years 1964 through 1969 petitioners failed to report their fifty percent distributive share of the unreported income of the Partnership.

(f) (i) For the taxable years 1964 through 1969 the Partnership unreported taxable income was comprised of the following:

Exhibit #2 (Savings) Account
Civil Action 2496-3 Hudson County National Bank

	1941	1942	1943	1944	1945	1946
HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS		$18,462.63	$22,273.24	$34,998.83	$33,369.99	$31,971.84
ST. PAUL OF THE CROSS Jersey City, N. J.		-	-	16,676.80	16,928.00	6,663.89
ST. LAWRENCE CHURCH Weehawken, N. J.		-	2,089.00	9,062.10	3,884.90	-
BOARD OF EDUCATION Ridgefield, N. J.		4,784.00	-	-	-	-
CITY OF JERSEY CITY New Jersey		36.00	-	-	-	-
ST. MATTHIAS CHURCH Jersey City, N. J.		8,298.78	-	1,294.62	-	-
[illegible] PLANE HOUSE, INC. Elizabeth, N. J.		-	190.00	-	-	-
HUDSON COUNTY BOULEVARD [illegible]		2,194.33	-	-	-	-
[illegible] CATHOLIC ARCHDIOCESE [illegible] BUREAU (Secular) Dev.)		1,944.60	-	-	-	-
[illegible] TRUSTEE DEPOSIT Jersey City, N. J.		2,491.41	18,433.88	48,799.96	33,819.68	36,120.96
[illegible] Deposits	$88,000.31	22,917.64	22,914.64	19,889.62	84,136.41	61,888.88
[illegible] Check Fund Co. [illegible] Hospital	-	-	-	-	-	-
[illegible] Income						

Answer

(ii) In addition during the taxable year 1964 the Partnership's unreported taxable income was comprised of the following:

Hudson County Boulevard Commission

Checks cashed	$ 9,104.05
Checks applied in payment of Notes	2,126.14
Total Unreported Income	$11,230.19

(g) The books and records of the Partnership did not reflect checking account number 020-023489-5 at Hudson County National Bank (hereinafter Bank Account) or the income reflected therein nor the checks cashed or applied in payment of notes for the taxable years 1964 through 1969.

(h) (i) During the taxable years 1964 through 1969, the Partnership retained the services of a Certified Public Accountant who performed quarterly audits, closed the books yearly and prepared returns for the Partnership and the petitioners.

(ii) The tax returns of the Partnership and the petitioners for the taxable years 1964 through 1969 were prepared by said accountant based upon the books and records of the Partnership and from information furnished by petitioners.

Answer

(i) Prior to 1971 petitioner had kept secret the existence of the Bank Account, even from his accountant, into which taxable business receipts were deposited.

(j) The books and records of the Partnership were subpoenaed by Grand Juries impanelled June 9, 1970, June 11, 1970, November 11, 1970, June 14, 1971 and June 23, 1971 in connection with a probe of political corruption in Hudson County.

(k) In late February or early March, 1971 the petitioner contacted the accountant and revealed the secret business Bank Account and stated it was not recorded on the books and records of the Partnership and the receipts deposited therein were not reported.

(l) On August 17, 1971 amended returns were filed by the Partnership and the petitioners for the taxable years 1965 through 1969.

(m) The amended returns were prepared by the accountant from charts furnished by the petitioner for each of the taxable years 1965 through 1969, showing sales, sales of junk, accounts receivables and refunds.

(n) For the taxable years 1964 through 1969 petitioners filed original income tax returns reporting taxable income attributable to the Partnership as follows:

1964	$57,356.39
1965	$68,227.43
1966	$63,659.89
1967	$77,438.52
1968	$90,283.52
1969	$64,117.29

Answer

(o) On the amended returns filed by the petitioners for the taxable years 1965 through 1969, they reported taxable income attributable to the Partnership as follows:

1965	$ 98,127.87
1966	$ 94,659.66
1967	$138,694.69
1968	$157,958.10
1969	$137,756.37

(p) On the Partnership return for the year 1969 the Partnership improperly wrote off as uncollectible an accounts receivable with respect to JFK Office Building in the amount of $6,526.95.

(q) The petitioners fraudulently, and with intent to evade tax, omitted from their original income tax returns for the taxable years 1964 through 1969 their distributive share of unreported Partnership income, at least, in the amounts as follows:

1964	$33,555.25
1965	$29,900.44
1966	$30,999.77
1967	$61,256.62
1968	$67,674.58
1969	$73,639.08

(r) The petitioners fraudulently understated the tax due on their original income tax returns for the taxable years 1964 through 1969 at least in the amounts as follows:

1964	$21,072.39
1965	$18,453.48
1966	$19,996.21
1967	$39,824.89
1968	$49,832.86
1969	$54,350.88

(s) All or part of the understatement of tax required to be shown on the petitioners' original income tax returns for the taxable years 1964 through 1969 is due to fraud.

9. FURTHER ANSWERING the petition, and as a defense to the assignment of error that the statute of limitations bars the assessment and collection of the deficiency in income tax due from the petitioner for the taxable year 1964 the respondent alleges that the income tax due from the petitioner for the taxable year 1964 may be assessed or a proceeding in Court for the collection of such tax may be begun without assessment, at anytime under the provisions of I.R.C. §6501(c) (1), since the petitioner filed a false and fraudulent income tax return for said year with intent to evade tax, as is more fully set forth by the facts alleged in paragraph 8. above, which facts are incorporated by this reference and relied upon by the respondent as a defense to the statute of limitations issue.

10. FURTHER ANSWERING the petition and in support of the determination that a part of the underpayment of tax required to be shown on the income tax return of the petitioner Ernest Badaracco, Sr. for the taxable year 1967 is due to fraud by petitioner Ernest Badaracco, Sr., the respondent affirmatively relies upon the doctrine of collateral estoppel (estoppel by judgment) and alleges:

Answer

(a) Ernest Badaracco, Sr., petitioner herein, is the same person who was the defendant in the criminal case of *U.S. v. Ernest Badaracco, Sr. & Ernest Badaracco, Jr.*, (United States District Court for the District of New Jersey, Criminal Docket No. 766-71).

(b) The respondent herein is a party in privity with the United States of America, the prosecuting party in the aforesaid case in which petitioner Ernest Badaracco, Sr. herein was the defendant.

(c) The indictment in the case of *U.S. v. Ernest Badaracco, Sr., supra,* contained 15 counts. Petitioner pleaded guilty to the Third Court in the indictment.

(d) Count 3 of the indictment charged that on or about the 15th day of April, 1968, in the District of New Jersey,

ERNEST BADARACCO, SR.
and ERNEST BADARACCO, JR.

partners in Badaracco Bros. and Co., a partnership having its principal place of business in Hoboken, New Jersey, did willfully and knowingly make and subscribe and did willfully and knowingly cause to be made and subscribed, a U. S. Partnership Return of Income (Form 1065) for the calendar year 1967 for Badaracco Bros. and Co., a partnership, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at Newark, New Jersey, which said income tax return they did not believe to be true and correct as to every material matter in that it was stated on line

27, page 1 of the said income tax return that ordinary income was $154,876.13, whereas, as they then and there well knew and believed, ordinary income for the period reported was substantially in excess of $154,876.13. In violation of Section 7206(1), Internal Revenue Code; Title 26, United States Code, Section 7206(1) and Title 18, United States Code, Section 2.

(e) A finding of fact that the petitioner Ernest Badaracco, Sr. did willfully file a false partnership return for the taxable year 1967 in that Partnership income was understated was essential to support the finding by the Court that the defendant Ernest Badaracco, Sr. was guilty as charged in the aforementioned count of the indictment.

(f) One of the issues in the instant case is whether the addition to tax imposed by section 6653(b) should be imposed against the petitioner for the taxable year 1967 with respect to his individual joint income tax return.

(g) Said issue in the instant case is the same as the issue presented in the aforesaid criminal case and determined adversely to the petitioner, upon his plea of guilty, to the extent that the conviction on the charge contained in Count 3 of the indictment set forth above is dependent upon a finding that the petitioner did willfully and knowingly make and subscribe and did willfully and knowingly cause to be made and subscribed a Partnership return for the year 1967 in that petitioner understated the ordinary income of the Partnership which necessarily resulted in the understatement of petitioner's ordinary income reported on his individual income tax return.

Answer

(h) The prior criminal conviction of the petitioner Ernest Badaracco, Sr., upon his plea of guilty, under section 7206(1) for the taxable year 1967 is conclusive and binding on the petitioner. By reason thereof the petitioner is estopped in the instant case under the doctrine of collateral estoppel (estoppel by judgement) from denying herein that he did willfully and knowingly make and subscribe a false federal income tax return and that the items which are the basis for the allegations of fraud set forth in paragraph 8. herein were reportable as ordinary income in 1967.

WHEREFORE, it is prayed:

(1) That the relief sought in the petition be denied;

(2) That the deficiency in income tax for the year 1964, as set forth in the statutory notice, be in all respects approved;

(3) That the additions to the tax for the taxable years 1964 through 1969 under the provisions of section 6653(b) as set forth in the statutory notice, be in all respects approved;

(4) That the Court determine that the assessment and collection of the deficiency in income tax and addition to tax under section 6653(b), for the year 1964 as set forth in the statutory notice are not barred by the statute of limitations; and

(5) That the Court determine that petitioner Ernest Badaracco, Sr. is estopped under the doctrine of collateral estoppel (estoppel by judgment) from denying that he willfully and knowingly made and subscribed a false and

fraudulent income tax return for the taxable year 1967 and that he knew and believed that the ordinary income as set forth in paragraph 8. above was reportable by him in that year.

STUART E. SEIGEL
Chief Counsel
Internal Revenue Service
By: JOHN J. HOPKINS
Assistant Regional Counsel
Dated: 4/14/78

Of Counsel:

Robert L. Liken
Regional Counsel

James F. Kearney
Attorney
Internal Revenue Service
970 Broad Street, Room 904
Newark, New Jersey 07102
Tel. No. 201-645-2628

Certificate of Service

This is to certify that a copy of the foregoing paper was served on Edwin Fradkin, Esquire, Starr, Weinberg and Fradkin by mailing the same on Apr 14 1978 in a postage-paid wrapper addressed to him at 744 Broad Street, Newark, New Jersey, 07102.

Dated: Apr 14 1979

JAMES F. KEARNEY
Attorney

Reply to Answer.

The above-captioned petitioners, pursuant to Rule 37(a) of the Rules of Practice and Procedure Before This Court, in reply to the affirmative allegations pleaded by respondent in his answer in this case admit and deny and aver as follows:

4. Deny the allegation set forth in paragraph 4 of respondent's answer. Allege that the deficiencies in dispute are as set forth in paragraph 4 of the petition.

8(a) Admit the allegation set forth in subparagraph (a) of paragraph 8 of respondent's answer.

8(b) through (g), inclusive. Deny the allegations set forth in subparagraphs (b) through (g), inclusive, and subparagraphs thereof, of paragraph 8 of respondent's answer.

8(h)(i) and (ii). Admit the allegations set forth in subparagraphs (h)(i) and (ii) of paragraph 8 of respondent's answer.

8(i). Deny the allegation set forth in subparagraph (i) of paragraph 8 of respondent's answer.

8(j). Admit the allegation set forth in subparagraph (j) of paragraph 8 of respondent's answer.

8(k). Deny the allegation set forth in subparagraph (k) of paragraph 8 of respondent's answer.

8(l). Admit the allegation set forth in subparagraph (l) of paragraph 8 of respondent's answer.

Reply to Answer

8(m). Aver that at the present time they have no knowledge of the manner of preparation by the accountant.

8(n) and (o). Admit the allegations set forth in subparagraphs (n) and (o) of paragraph 8 of respondent's answer.

8(p) through (s), inclusive. Deny the allegations set forth in subparagraphs (p) through (s), inclusive, of paragraph 8 of respondent's answer.

9. Deny the allegations set forth in paragraph 9 of respondent's answer.

10. Deny that the doctrine of collateral estoppel is applicable in this proceeding. *cf. United States v. Anderson,* (U.S.D.C., W.D. Ark. 1966), 254 F.S. 177, 66-1 USTC para. 9441. Also aver that a plea as to a violation under section 7206(1) of the Internal Revenue Code of 1954 does not operate as collateral estoppel to an alleged addition to the tax under section 6653(b) of the Internal Revenue Code of 1954 in that the subject matter of the sections are not identical.

(a) to (d), inclusive. Admit the fact set forth in subparagraphs (a) to (d), inclusive, of paragraph 10 of respondent's answer.

(e). Subparagraph (e) of paragraph 10 of respondent's answer sets forth a legal conclusion to which petitioners need not file an affirmance or denial.

Reply to Answer

(f). Admit the fact set forth in subparagraph (f) of paragraph 10 of respondent's answer.

(g). Deny the factual allegations set forth in subparagraph (g) of paragraph 10 of respondent's answer.

(h) Subparagraph (h) of paragraph 10 of respondent's answer sets forth a legal conclusion to which petitioners need not file an affirmance or denial.

WHEREFORE, it is prayed that the affirmative relief sought by the respondent in his answer be denied and that the Court give relief in accordance with the prayer set forth by petitioners in their answer.

Dated: May 25, 1978

JOHN J. O'TOOLE

STARR, WEINBERG and FRADKIN,
744 Broad Street
Newark, New Jersey 07102
(201) 623-5346

Amendment to Petition.

. 5(f) The respondent has erroneously determined the existence of the application of the additions to the tax under section 6653(b) of the Internal Revenue Code of 1954 to the taxable years 1965 to 1969, inclusive, in that said years are barred as to assessment by reason of section 6501(a) and 6659(a) of the Internal Revenue Code of 1954.

6(g)(1) The petitioners filed original returns for each of the taxable years as follows:

Year	*Date Filed*
1965	4/15/66
1966	4/15/67
1967	4/15/68
1968	5/28/69
1969	4/15/70

(a) The respondent has determined these said returns were fraudulent in nature under section 6653(b), *supra.*

(2) Subsequent to the filing of said original returns the petitioners filed non-fraudulent amended returns for each of the taxable years 1965 to 1969, inclusive, on August 17, 1971.

(3) The statutory notice addressed to the petitioners was issued on November 21, 1977.

(4) The issuance of the said statutory notice was beyond the three year statute of limitations provided in section 6501(a), *supra*, as such would be applied to the aforesaid filing of the non-fraudulent amended returns.

Amendment to Petition

(5) Section 6659(a), *supra*, provides that the addition to the tax under section 6653(b), *supra*, shall be assessed in the same manner as the tax.

(6) By virtue of the provisions of section 6659(a), *supra*, section 6501(a), *supra*, is applicable to the determination of the addition to the tax under section 6653(b), *supra*.

(7) Because of the application of section 6501(a), *supra*, to the non-fraudulent returns, the determination of the respondent as to the imposition of the addition to the tax under section 6653(b), *supra*, as set forth in the statutory notice is erroneous.

WHEREFORE, it is prayed that in addition to the relief requested in the petition, this Court determine that section 6501(a) *supra*, is applicable to bar the imposition of the addition to the tax under section 6653(b), *supra*, as to each of the taxable years 1965 to 1969, inclusive.

Dated: March 12, 1981

JOHN J. O'TOOLE

STARR, WEINBERG and FRADKIN,
744 Broad Street
Newark, New Jersey 07102
(201) 623-5346

Answer to Amendment to Petition.

THE RESPONDENT, in answer to the amendment to the petition filed in the above-entitled case, admits, denies and alleges as follows:

5(f). Denies the allegations set forth in subparagraph (f) of paragraph 5. of the amendment to the petition.

6(g)(1) through (g)(3). Admits the allegations contained in subparagraphs (g)(1) through (g)(3) of the amendment to the petition.

6(g)(4). Denies the allegations contained in subparagraph (g)(4) of paragraph 6. of the amendment to the petition.

6(g)(5). Admits the allegations contained in subparagraph (g)(5) of paragraph 6. of the amendment to the petition.

6(g)(6) and (g)(7). Denies the allegations contained in subparagraphs (g)(6) and (g)(7) of the amendment to the petition.

7. Denies generally each and every allegation of the amendment to the petition not hereinbefore specifically admitted, qualified or denied.

11. FURTHER ANSWERING the amendment to the petition, and as a defense to the assignment of error raised in the amendment to the petition that the statute of limitations bars the assessment and collection of the additions to the tax pursuant to I.R.C. §6653(b) due from petitioner, Ernest Badaracco, Sr., for the taxable years 1965 through

1969, the respondent alleges that the additions to the tax due from the petitioner for the taxable years 1965 through 1969 may be assessed or a proceeding in Court for the collection of such additions to the tax may be begun without assessment, at anytime under the provisions of I.R.C. section 6501(c)(1) and section 6659, since the petitioner filed false and fraudulent income tax returns for said years with intent to evade tax, as is more fully set forth by the facts alleged in paragraph 8. of the answer filed in this case, which facts are incorporated by this reference and relied upon by the respondent as a defense to the statute of limitations issue.

WHEREFORE, it is prayed: (6) That the Court determine that the assessment and collection of the additions to the tax pursuant to I.R.C. section 6653(b) for the taxable years 1965 through 1969 as set forth in the statutory notice are not barred by the statute of limitations.

EMORY L. LANGDON
Acting Chief Counsel
Internal Revenue Service

By: EDWARD H. HANCE
District Counsel

Dated: 3-13-81

Of Counsel:

David E. Gaston
Regional Counsel

Robert B. Marino
Attorney
Internal Revenue Service
970 Broad Street—Room 904
Newark, New Jersey 07101
Tel. No. (201) 645-3348

Stipulation for Trial (Docket Nos. 1700-78 and 1701-78).

In accordance with Tax Court Rule 91, the below-signed parties agree to this Stipulation For Trial pursuant to the general terms of this preamble, unless specifically expressed otherwise. All stipulated facts shall be conclusive. All stipulated exhibits shall be considered authentic. All copies shall be considered electronic reproductions of the originals and shall be treated as if originals.

1. With respect to Docket No. 1700-78, the parties agree that there is a deficiency in income tax due from the petitioners for the taxable year 1964 in the amount of $21,072.39.

2. With respect to Docket No. 1700-78, the parties agree that there is an addition to the tax pursuant to I.R.C. §6653(b) due from Ernest Badaracco, Sr. for the taxable year 1964 in the amount of $10,536.20.

3. With respect to Docket No. 1701-78, the parties agree that there is a deficiency in income tax due from the petitioners for the taxable year 1964 in the amount of $20,331.07.

4. With respect to Docket No. 1701-78, the parties agree that there is an addition to the tax pursuant to I.R.C. §6653(b) due from Ernest Badaracco, Jr. for the taxable year 1964 in the amount of $10,165.54.

5. With respect to Docket No. 1700-78, Ernest Badaracco, Sr. concedes that, subject to the resolution of the issue noted in paragraph 7, *infra*, the underpayments of tax for the taxable years 1965 through 1969 are due to fraud within the meaning of I.R.C. §6653(b) and are in the following amounts:

Year	*Addition Under I.R.C. §6653(b)*
1965	$ 9,226.74
1966	9,998.11
1967	19,912.45
1968	24,916.43
1969	27,175.44

6. With respect to Docket No. 1701-78, Ernest Badaracco, Jr. concedes that, subject to the resolution of the issue noted in paragraph 7, *infra*, the underpayments of tax for the taxable years 1965 through 1969 are due to fraud within the meaning of I.R.C. §6653(b) and are in the following amounts:

Year	*Addition Under I.R.C. §6653(b)*
1965	$ 8,775.99
1966	9,071.82
1967	18,969.97
1968	23,304.95
1969	24,503.43

7. The sole issue which the petitioners in both dockets present to the Court is whether the filing of non-fraudulent amended returns, subsequent to having filed fraudulent returns, entitles them to the statutory period of three years as provided in section 6501(a) of the Internal Revenue Code of 1954.

8. The petitioners filed original income tax returns on the following dates:

Stipulation for Trial (Docket Nos. 1700-78 and 1701-78)

(a) Ernest Badaracco, Sr.

Taxable Year	*Date Filed*
1965	4/15/66
1966	4/15/67
1967	4/15/68
1968	5/28/69
1969	4/15/70

(b) Ernest Badaracco, Jr.

Taxable Year	*Date Filed*
1965	4/15/66
1966	4/15/67
1967	4/15/68
1968	5/28/69
1969	4/15/70

9. The petitioners, for purposes of this case, concede the fraudulent nature of the original returns in the amounts as set forth in paragraphs 5. and 6., *supra*.

10. The petitioners, subsequent to the filing of the original returns, filed non-fraudulent amended returns for each of their taxable years 1965 to 1969, inclusive, on August 17, 1971.

11. The statutory notices of deficiency in each of these cases were issued on November 21, 1977.

Stipulation for Trial (Docket Nos. 1700-78 and 1701-78)

12. The additions to the tax in this case, in the matter involving both petitioners for each of the taxable years 1965 to 1969, inclusive, are calculated upon the underpayments shown on the amended returns.

JOHN J. O'TOOLE
Counsel for Petitioners

Dated: 3-12-81

EMORY L. LANGDON
Acting Chief Counsel
Internal Revenue Service

By: EDWARD H. HANCE
District Counsel
970 Broad Street—Room 904
Newark, New Jersey 07102
Tel. No. (201) 645-3348

Dated: 3-12-81

Order and Decision Entered on August 11, 1981 (Docket No. 1700-78).

For cause, it is

ORDERED that the Decision entered August 6, 1981, in this case is hereby vacated and set aside. Pursuant to the determination of the Court, as set forth in its T.C. Memo. 1981-404, filed August 5, 1981, it is

ORDERED AND DECIDED: That there is a deficiency in petitioners' Federal income tax for the taxable year 1964 in the amount of $21,072.39, and an addition to tax for the taxable year 1964 in the amount of $10,536.20. It is further

ORDERED AND DECIDED: That there are no additions to tax pursuant to section 6653(b), Internal Revenue Code of 1954, due from petitioners for the years 1965 through 1969.

EDNA G. PARKER
Judge

Entered: Aug 11, 1981

Order and Decision Entered on August 11, 1981 (Docket No. 1701-78).

For cause, it is

ORDERED that the Decision entered August 6, 1981, in this case is hereby vacated and set aside. Pursuant to the determination of the Court, as set forth in its T.C. Memo. 1981-404, filed August 5, 1981, it is

ORDERED AND DECIDED: That there is a deficiency in petitioners' Federal income tax for the taxable year 1964 in the amount of $20,331.07, and an addition to tax for the taxable year 1964 in the amount of $10,165.54. It is further

ORDERED AND DECIDED: That there are no additions to tax pursuant to section 6653(b), Internal Revenue Code of 1954, due from petitioners for the years 1965 through 1969.

EDNA G. PARKER
Judge

Entered: Aug 11, 1981

DELEET MERCHANDISING CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Papers in Deleet Merchandising Corp. Proceeding.

Docket Entries.

Civil 80-26

DATE	NR	PROCEEDINGS
1-4-80	1	Complaint and *Jury Demand* filed.
1-4-80		Summons issued. (60 days)
1-4-80	2	Notice of Allocation and Assignment filed. (Newark-Biunno)
1-28-80	3	Summons returned served on the Internal Revenue Service and on the U.S. Attorney on 1-9-80 and on the U.S. Attorney General on 1-14-80, filed.
3-24-80	4	*Answer*, filed 3-21-80.
4-15-80	5	Plaintiff's First Request for production of documents, filed.
4-15-80	6	Plaintiff's First set of interrogatories, filed.
5-12-80	7	Notice of motion by defendant to dismiss the complaint ret. 6-9-80 and certificate of service, filed 5-9-80. (Brief submitted)
6-10-80		At call for hearing on motion of defendant to dismiss the complaint, court reported motion withdrawn. (Biunno) (6-9-80)
6-19-80	8	Stipulation and order adjourning defendant's motion for summary judgment to September 22, 1980, filed. (Biunno) Notice mailed.
9-26-80	9	Defendant's Preliminary interrogatories, filed 9-25-80.
9-30-80	10	*Pre-Trial order*, filed. (Cowen) Notice mailed. (directing plaintiff to answer defendant's interrogatories by

		December 1, 1980, etc.; and extending discovery to Feb. 1, 1981)
10-9-80	11	Second Request for Plaintiff for production of documents filed 10-6-80.
10-9-80	12	Second Set of Interrogatories of Plaintiff filed 10-6-80.
10-17-80	13	Answers of Defendant to Plaintiff's First Set of Interrogatories filed 10-16-80.
10-17-80	14	Answers of Defendant to Plaintiff's First Request for Production of Documents filed 10-16-80.
11-10-80	15	Answers of defendant to plaintiff's second set of interrogatories, filed 11-7-80.
11-10-80	16	Answers of defendant to plaintiff's second request for production of documents, filed 11-7-80.
12-10-80	17	Stipulation and order adjourning plaintiff's motion to compel answers to interrogatories, etc. to February 23, 1981, filed 12-9-80. (Biunno) Notice mailed.
11-23-81	18	Notice of motion of plaintiff for summary judgment, returnable 12-14-81 and affidavit of Barry I. Fredericks and affidavit of service, filed 11-20-81. (Brief submitted)
12-1-81	19	Memorandum, filed. (Biunno) (directing parties to review questions and have answers by Dec. 14, 1981)
12-4-81	20	Copy of Order of Reassignment to JUDGE FISHER filed. (Fisher) Notice mailed.

Docket Entries

12-11-81		Affidavit of Edward Sussman, filed 12-10-81.
12-15-81		Hearing on motion by plaintiff for summary judgment. Ordered motion granted. Order to be submitted. (Fisher) (12-14-81)
12-23-81	22	Opinion filed 12-22-81. (Fisher) (Motion of plaintiff for summary judgment granted.) (Copy to NJLJ)
12-23-81	23	*Order granting summary judgment for $114,193.83,* with costs in favor of plaintiff, Deleet Merchandising Corporation and against defendant, United States of America, filed 12-22-81. (Fisher) Notice mailed.
1-21-82	24	Notice of plaintiff to tax costs and verified bill of costs, filed.
2-19-82	25	Notice of appeal by defendant, filed 2-18-82 at 4:45 P.M.
2-19-82		Copies of notice of appeal sent to U.S.C.A. and Fredericks & Messinger Esqs.
2-26-82	26	Taxation of Plaintiff's Costs in the Sum of $80.00 filed. Notice mailed.

Complaint and Jury Demand.

Plaintiff Deleet Merchandising Corp., by its attorneys, Fredericks & Messinger, and Goldschmidt, Fredericks, Kurzman & Oshatz, for its complaint, alleges as follows:

JURISDICTION

1. The plaintiff Deleet Merchandising Corp. (hereinafter sometimes referred to as "Deleet") is a corporation duly organized and existing under the laws of the State of New Jersey, with its principal place of business at 26 Blanchard Street, Newark, New Jersey, 07105.

2. The defendant the United States of America, through its agents, the Secretary of the Department of the Treasury and the Commissioner of the Internal Revenue Service, is charged with and responsible for the collection of income tax due to the federal government by the plaintiff.

3. This is an action instituted pursuant to and jurisdiction arises under the provisions of 28 U.S.C. Section 1346(a) (1) for the recovery of Income Taxes, and penalties, erroneously or illegally assessed or collected from the plaintiff.

AS AND FOR ITS FIRST CAUSE OF ACTION

4. The plaintiff Deleet timely filed its Income Tax Return with the Internal Revenue Service Center at Holtsville, New York, and paid the tax shown to be due thereon in the amount of $5,233.05 for the taxable year ending December 31, 1967.

5. Thereafter, the plaintiff Deleet timely filed an Amended Income Tax Return for the year 1967 with the District Director of Internal Revenue at Newark, New Jersey, and requested the refund shown to be due thereon in the amount of $6,206.00 (A copy of that Amended Income Tax Return is attached hereto and marked Exhibit "A".)

6. Plaintiff Deleet received a notice dated December 14, 1979, stating that its claim for refund was disallowed, and that a deficiency for the year 1967 in the amount of $25,248.00 and penalties in the amount of $13,356.00 were assessed against the plaintiff Deleet.

7. On or about December 27, 1979, plaintiff Deleet paid the deficiency together with penalties for a total payment of $38,604.00.

8. The action of the defendant, through its agents, the Secretary of the Department of Treasury and the Commissioner of the Internal Revenue Service, in assessing and collecting the deficiency and penalties referred to in Paragraph 6 was improper, illegal and erroneous.

9. Therefore, the plaintiff Deleet has overpaid Income Tax for the year 1967 in the amount of $38,604.00, which amount, together with interest as provided by law, are due and owing to the plaintiff Deleet from the defendant.

10. Plaintiff Deleet is the sole owner of the aforesaid claim for refund and has made no assignment of said claim.

AS AND FOR ITS SECOND CAUSE OF ACTION

11. Plaintiff Deleet repeats and realleges each and every allegation heretofore set forth in paragraphs 1, 2 and 3, as if more fully set forth at length herein.

12. The plaintiff Deleet timely filed its 1968 income tax return with the Internal Revenue Service Center at Holtsville, New York, and paid the tax shown to be due thereon in the amount of $4,242.46, for the taxable year ending 1968.

13. Thereafter, the plaintiff Deleet timely filed an Amended Income Tax Return claiming a refund for the year 1968 with the District Director of Internal Revenue at Newark, New Jersey, and paid the tax shown to be due thereon in the amount of $36,608.00. (A copy of the amended Income Tax Return is attached hereto and marked Exhibit "B".)

14. Plaintiff Deleet received a notice dated December 14, 1979, stating that its claim for refund was disallowed and that there was a deficiency for the year 1968 in the amount of $36,314.01, and penalties in the amount of $39,275.82 were assessed against the plaintiff Deleet.

15. On or about December 27, 1979, plaintiff Deleet paid the deficiency together with penalties in the amount of $39,275.82, or a total payment of $75,589.83.

16. The action of the defendant, through its agents, the Secretary of the Department of Treasury and the Commissioner of the Internal Revenue Service in assessing and collecting the deficiency, and penalties referred to in Paragraph 14 was improper, illegal and erroneous.

17. Therefore, the plaintiff has overpaid its income tax for the year 1968 in the amount of $75,589.83, which amount together with interest as provided by law, are due and owing to the plaintiff from the defendant.

18. Plaintiff is the sole owner of the aforesaid claim for refund and has made no assignment of said claim.

WHEREFORE, plaintiff prays that judgment be entered in its favor as follows:

A. As and for its First Cause of Action: $38,604.00, with interest as provided by law; and

B. As and for its Second Cause of Action: $75,589.83, with interest as provided by law; and

Such other further and different relief as to the Court may appear just and proper.

FREDERICKS & MESSINGER
Attorneys for Plaintiff Deleet
Merchandising Corp.

By (Illegible)
A Member of the Firm
39 Hudson Street
Hackensack, New Jersey 07601
(201) 489-7171

and

GOLDSCHMIDT, FREDERICKS,
KURZMAN & OSHATZ
655 Madison Avenue
New York, New York 10021
(212) 838-2424

Jury Demand

Plaintiff Deleet Merchandising Corp. hereby Demands a Trial by Jury.

FREDERICKS & MESSINGER
Attorneys for Deleet Merchandising Corp.

By (Illegible)
A Member of the Firm

Answer.

Comes now the defendant, the United States of America, by its attorney, Robert J. Del Tufo, and answers the plaintiff's complaint as follows:

FIRST DEFENSE

1. The defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the complaint.

2. The defendant admits the allegations contained in Paragraph 2 of the complaint.

3. Jurisdiction exists, if at all, pursuant to 28 U.S.C., Section 1346(a) (1). The defendant denies any income taxes and penalties have been erroneously or illegally assessed or collected from the plaintiff.

4-7. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 4 through 7 of the complaint.

8 and 9. The defendant denies the allegations contained in Paragraphs 8 and 9 of the complaint.

10. The defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the complaint.

11. The defendant repeats each and every answer heretofore set forth in Paragraphs 1, 2 and 3.

Answer

12-15. The defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraphs 12 through 15 of the complaint.

16 and 17. The defendant denies each and every allegation of fact contained in Paragraphs 16 and 17 of the complaint.

18. The defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the complaint.

SECOND DEFENSE

1. The defendant avers that the plaintiff, Deleet Merchandising Corporation, filed false and fraudulent income tax returns for the calendar years 1967 and 1968, with the intent to evade and defeat federal taxes.

2. The fraud committed by the plaintiff, Deleet Merchandising Corporation, consisted of willfully and knowingly filing false and fraudulent federal income tax returns for the calendar years 1967 and 1968 with the intent to evade and defeat taxes, and in willfully and knowingly failing to report on its 1967 and 1968 federal income tax returns amounts of taxable income received by it, and/or by unlawfully reducing the amount of taxable income reported by it with the intent to evade federal taxes.

WHEREFORE, the defendant prays that the plaintiff's complaint be dismissed with prejudice, that the defendant be awarded its costs in this action and the Court grant the defendant any other relief that it deems just and proper.

ROBERT J. DEL TUFO
United States Attorney

By: ANNE C. SINGER
Assistant United States Attorney

Of Counsel:
STEPHEN T. LYONS
Trial Attorney
Tax Division
Department of Justice
Washington, D. C. 20530

[Certificate of Service omitted]

Notice of Motion for Summary Judgment in Favor of Plaintiff.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Barry I. Fredericks, Esq., sworn to the 19th day of November, 1981, plaintiff will move this Court before the Honorable Vincent P. Biunno, at the United States District Court, United State Courthouse & Post Office Building, Newark, New Jersey 07102, on the 14th day of December, 1981 at 10:00 o'clock in the forenoon of that day or at such other time and place as the Court may determine for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of plaintiff, on the grounds that defendant's Notice of Deficiency was untimely under 26 U.S.C. §6501 and there are no material issues of fact in controversy and plaintiff is entitled to judgment as a matter of law, and for such other and further relief as may be proper under the circumstances.

Dated: November 19, 1981

Yours, etc.,

FREDERICKS & MESSINGER

By: (Illegible)
A Member of the Firm
Attorneys for Plaintiff
39 Hudson Street
Hackensack, N.J. 07631
(201) 487-7949

Notice of Motion for Summary Judgment in Favor of Plaintiff

To:

William W. Robertson
United States Attorney
U.S. Courthouse & Post Office Building
Newark, N. J. 07102

Stephen T. Lyons, Esq.
Tax Division
Department of Justice
Washington, D.C. 20530

Affidavit of Barry I. Fredericks in Support of Motion.

State of New Jersey,
County of Bergen, ss:

BARRY I. FREDERICKS, being duly sworn, deposes and says:

1. I am a member of the law firms of Fredericks & Messinger, and Goldschmidt, Fredericks & Oshatz, attorneys for the plaintiff herein. We make this motion for an order granting plaintiff summary judgment against defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there are no material issues of fact and that plaintiff is entitled to judgment as a matter of law.

2. The undisputed facts are set forth in plaintiff's brief submitted herewith pursuant to Rule 12(F) of the Rules of this Court. Briefly stated these undisputed facts reveal that plaintiff timely filed its Income Tax Returns for the taxable years ending December 31, 1967 and December 31, 1968 with the Internal Revenue Service Center at Holtsville, New York. Plaintiff paid the tax shown to be due on said Income Tax Returns in the amount of $5,233.05 for 1967, and $36,608.00 for 1968.

3. Thereafter, on August 9, 1973 the plaintiff timely filed Amended Income Tax Returns for the years 1967 and 1968 with the District Director of Internal Revenue at Newark, New Jersey. (Copies of these amended returns are annexed hereto as Exhibits "A" and "B"). Plaintiff requested a refund of $6,206.00 shown to be due plaintiff for 1967, and paid $36,314.01 shown to be due defendant for 1968.

Affidavit of Barry I. Fredericks in Support of Motion

4. Plaintiff received a Notice of Deficiency, dated December 14, 1979 (hereinater the "Notice", a copy of which is annexed hereto as Exhibit "C"). The Notice stated *inter alia* that plaintiff's claim for a refund for 1967 was disallowed, and that a deficiency for that year, in the amount of $25,248.00 and penalties in the amount of $13,356.00 were assessed against said plaintiff. The Notice also stated that plaintiff's claim for a refund for 1968 was disallowed and that there was assessed a deficiency for that year against plaintiff in the amount of $36,314.01, as well as penalties in the amount of $39,275.82.

5. On or about December 27, 1979, plaintiff paid the assessed deficiencies and penalties for 1967 and 1968 in the amount of $114,193.83.

6. No extensions of the Statute of Limitations for the years in question were requested by the Government nor granted by the plaintiff.

7. On or about January 8, 1980 plaintiff filed its summons and complaint (copies of which are annexed hereto as Exhibit "D") seeking judgment in the amounts allegedly improperly and illegally assessed by defendant.

8. On or about March 10, 1980 defendant filed its answer (a copy of which is annexed hereto as Exhibit "E").

9. As set forth in the accompanying memorandum of law, a Notice of Deficiency must be issued within the statutory three-year period commencing with the filing of the taxpayer's amended return. In the case at bar, the Notice of Deficiency assessing the taxes and penalties herein, was made more than six (6) years after the filing of

plaintiff's amended returns. Therefore, the assessments were untimely under 26 U.S.C. §650 and were improperly and illegally made.

10. Although the cases cited in the accompanying brief are clearly dispositive of the issues presented herein. There are certain relevant facts which are even more favorable to plaintiff herein. In both the *Dowell* case, decided by the Tenth Circuit Court of Appeals, and the *Badaracco* case, decided by the Tax Court, each petitioner was the subject of a criminal investigation the subject of which was his alleged original fraudulent tax return. In fact, it is clear that the motivation for filing the amended non-fraudulent returns in each of these cases was the pendency of the criminal investigation. In the instant case, plaintiff *voluntarily* and without governmental pressure of any type filed amended returns in 1973 notwithstanding that the statute of limitations had already run for the years in question.

11. Defendant's counsel has indicated that the government will attempt to persuade this Court to defer a decision on this motion pending resolution by the Third Circuit Court of Appeals of an appeal taken by the government in the *Badaracco* case. However, since the taxpayer in *Badaracco* was the subject of a criminal indictment, that case is distinguishable from this one. Plaintiff submits that the government's appeal in this case should be consolidated with the *Badaracco* appeal. If the appeal in this case is heard after a reversal of *Badaracco*, plaintiff might suffer substantial prejudice.

WHEREAS, plaintiff respectfully requests that this Court issue an Order granting summary judgment in favor of plaintiff on the first and second causes of action in the complaint, and such other relief which is just and proper.

(Sworn to by Barry I. Fredericks, November 19, 1981.)

Exhibit A, Annexed to Affidavit of Barry I. Fredericks—Amended Corporate Income Tax Return for 1967.

Form 1120 — U.S. Corporation Income Tax Return — 1967

U.S. Treasury Department, Internal Revenue Service

For the calendar year January 1–December 31, 1966, or other taxable year beginning _____, 1966, ending _____, 19__

(PLEASE TYPE OR PRINT)

Check if: A Sale, transfer, etc. ☐ or partnership ☐ (enter name, etc.) to be taxed as a corporation. B Consolidated return ☐ C Personal Holding Co. ☐ D Business Code No. (see instr.)

Name: DELEET MERCHANDISING CORP

E Employer Identification No.: 13-1972794

Number and street: 26 BLANCHARD ST.

F County in which located:

City or town, State, and ZIP code: NEWARK N.J.

G Enter total assets from line 14 Sch. L (see instruction 6)

IMPORTANT—All applicable lines and schedules must be filled in. If the lines on the schedules are not sufficient, see instruction Q.

GROSS INCOME

1	Gross receipts or gross sales _____ Less: Returns and allowances _____	1,616,961
2	Less: Cost of goods sold (Schedule A) and/or operations (attach schedule)	1,153,908
3	Gross profit	463,053
4	Dividends (Schedule C)	
5	Interest on obligations of the United States and U.S. instrumentalities	
6	Other interest	
7	Rents	
8	Royalties	
9	Net gains (losses)—(separate Schedule D)	
10	Other income (attach schedule)	
11	TOTAL income—Add lines 3 through 10	463,053

DEDUCTIONS

12	Compensation of officers (Schedule E)	105,150
13	Salaries and wages (not deducted elsewhere)	
14	Repairs (do not include cost of improvements or capital expenditures)	
15	Bad debts (Schedule F if reserve method is used)	18,000
16	Rents	76,455
17	Taxes (attach schedule)	6,250
18	Interest	516
19	Contributions (attach schedule—see instructions for limitation)	
20	Losses by fire, storm, shipwreck, other casualty, or theft (attach schedule)	
21	Amortization (attach schedule)	
22	Depreciation (Schedule G)	6,750
23	Depletion (attach schedule)	
24	Advertising	310
25	(a) Pension, profit-sharing, stock bonus, annuity plans (see instructions)	20,361
	(b) Other employee benefit plans (see instructions)	
26	Other deductions (attach schedule)	261,285
27	TOTAL deductions in lines 12 through 26	494,863
28	Taxable income before net operating loss deduction and special deductions (line 11 less line 27)	(31,810)
29	Less: (a) Net operating loss deduction (see instructions—attach schedule)	
	(b) Special deductions (Schedule I)	
30	Taxable income (line 28 less line 29)	-0-

TAX

31	TOTAL income tax (Schedule J)		-0-
32	Credits: (a) Tax paid with Form 7004 application for extension (attach copy)	6,506 PAID	
	(b) Payments and credits on 1966 declaration of estimated tax		
	(c) Credit from regulated investment companies (attach Form 2439)		
	(d) Credit for U.S. tax on nonhighway gas. and lub. oil (attach Form 4136)		6,506
33	If tax (line 31) is larger than credits (line 32), the balance is TAX DUE. Enter balance here →		
34	If tax (line 31) is less than credits (line 32). Enter the OVERPAYMENT here →		6,506
35	Enter amount of line 34 you want: Credited on 1967 estimated tax _____ Refunded _____		

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

CORPORATE SEAL

Date _____ Signature of officer _____ Title _____

Date _____ Preparer's signature _____ Address _____

COPY

Exhibit A, Annexed to Affidavit of Barry I. Fredericks

SELECT MERCHANDISING
(U.S. CORPORATE TAX (LEDGER
1967

COST OF GOODS SOLD				
BEGINNING INVENTORY				106778
PURCHASES				1016715
SALARIES				155294
				1278787
LESS ENDING INVENTORY				124879
COST OF GOODS SOLD				1153908
PAYROLL				8053
MAIL EXPRESS				11397
OFFICE				57008
				76455
OTHER DEDUCTIONS				
TRAVEL + ENTERTAINMENT				20036
FREIGHT + CARTAGE				28613
RAILWAY + AUTO				20475
INSURANCE				9176
TELEPHONE				4810
LEGAL + AUDIT				2825
POSTAGE + PARCEL				5089
OFFICE EXPENSE				5167
BLDG EXP + MAINT				7685
HOSP + ENT				3527
ASSOC DUES				363
UNION DUES				834
GENERAL EXP				5319
WELFARE + PENSION FUND				4495
LOSS BY FIRE				20076
COMMISSIONS ELLIOTT LIROFF				55491
COMMISSIONS MARTIN WINDELL				55441
PERMITS				38
ELEC. + WATER				3337
				361783

Best Copy Available

Exhibit A, Annexed to Affidavit of Barry I. Fredericks

Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

1. Name, address, and social security number of officer	2. Title	3. Time devoted to business	Percent of corporation stock owned 4. Common	5. Preferred	6. Amount of compensation	7. Expense account allowances
[illegible]	Pres.	Dir.			26500.00	
[illegible]	Asst. Treas.	Dir.			26500.00	
[illegible]	Sec'y. Treas.	Dir.			26500.00	
[illegible]	Vice Pres.	Dir.			26650.00	
Total compensation of officers—Enter here and on line 12, page 1					106150.00	

Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 15)

1. Year	2. Trade notes and accounts receivable outstanding at end of year	3. Sales on account	Amount added to reserve 4. Current year's provision	5. Recoveries	6. Amount charged against reserve	7. Reserve for bad debts at end of year
1952						
1953						
1954						
1955						
1956						
1957						

Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13: Make no entry in column 7, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

1. Class and Depreciable Asset Guideline Period of Property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Method of computing depreciation	6. Life or rate	7. Depreciation for this year
1 Total additional first-year depreciation (do not include in items below)						
Buildings	8/1/59	7221.03	226.38	S.L.	10%	62.00
Furniture and fixtures						
Transportation equipment	6/30/60	6129.89	3585.97	S.L.	10%	552.00
Machinery and other equipment						
Other (specify)						
Leasehold Improvements	10/59	6754.00	2451.95	S.L.	5%	338.30
Copying Machine	2/10/55	1010.00	334.20	S.L.	33 1/3%	333.30
Vending Machine	12/60	400.00		S.L.	12 1/2%	50.00
2 Totals						6759.53
3 Less amount of depreciation claimed in Schedule A and elsewhere on return						6759.53
4 Balance—Enter here and on line 22, page 1						0

Schedule H—SUMMARY OF DEPRECIATION

	Straight line	Declining balance	Sum of the years-digits	Units of production	Additional first-year (section 179)	Other (specify)	Total
1 Under Rev. Procs. 62-21 and 65-13							
2 Other							

Exhibit A, Annexed to Affidavit of Barry I. Fredericks

H Date incorporated October 26, 19[illegible]

I (1) Did the corporation at the end of the taxable year own directly or indirectly 50 percent or more of the voting stock of a domestic corporation? . . . . . Yes ☐ No ☐

(2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50 percent or more of the corporation's voting stock? . . . . . Yes ☐ No ☐
(For rules of attribution, see section 267(c).)

If the answer to (1) or (2) is "Yes," attach a schedule showing:

(a) name, address, and identifying number; and

(b) percentage owned.

If the answer to (1) above is "Yes," include the taxable income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

J Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951? . . . . . Yes ☐ No ☐
If "Yes," enter the aggregate gross dollar amount billed during the year

K Amount of taxable income (or loss) from line 30, page 1, Form 1120 for: 1964 7[illegible]2.19 1965 13[illegible]3.59 1966 23[illegible]5.36

L Did you claim a deduction for expenses connected with:

(1) A hunting lodge ☐, working ranch or farm ☐, fishing camp ☐, resort property ☐, pleasure boat or yacht ☐, or other similar facility ☐? (Other than where the operation of the facility was the principal business.) Yes ☐ No ☐

(2) The leasing, renting, or ownership of a hotel room or suite ☐, apartment ☐, or other dwelling ☐, which was used by customers or employees or members of their families? (Other than use by employees while in business travel status.) Yes ☐ No ☐

(3) The attendance of your employees' families at conventions or business meetings? Yes ☐ No ☐

(4) Vacations for employees or members of their fami
(Other than amount reported on Form W-2.) Yes ☐ No

M Refer to page 7 of instructions and state the:

Principal business activity Printing Supplies

Principal product or service

N Were you a member of a controlled group subject to the p
visions of section 1561 Yes ☐ No ☐, or section 15
Yes ☐ No ☐
If "Yes," check type of relationship:
(1) parent-subsidiary ☐
(2) brother-sister ☐
(3) combination of (1) and (2) ☐ (See section 1563)

O Were you liable for filing Forms 1096 and 1099 or 1087 for
calendar year 1967? . . . . . Yes ☐ No
If "Yes," where were they filed?

P Was there any substantial change in the manner of determin
quantities, costs, or valuations between opening and clos
inventory)? . . . . . Yes ☐ No
If "Yes," attach explanation.

Q Did you pay dividends during the taxable year which you consider
to be partially or wholly nontaxable to shareholders? Yes ☐ No
(See sections 301 and 316.) If this is a consolidated return, enc
here for parent corporation and on Form 851, "Affiliations Schedu
for each subsidiary.

R Were you a U.S. shareholder of any controlled foreign corpo
tion? Yes ☐ No ☒. (See sections 951 and 957.) If "Yes
attach Form 2848 for each such corporation.

Exhibit A, Annexed to Affidavit of Barry I. Fredericks

Form 1120 (1968) [Page 4]

Schedule L—BALANCE SHEETS	Beginning of taxable year (A) Amount	(B) Total	End of taxable year (C) Amount	(D) Total
ASSETS				
1 Cash		(5~~5)		5003
2 Trade notes and accounts receivable	105 635	105 635	125 43~	125 43~
(a) Less allowance for bad debts		106 776		120 579
3 Inventories				
4 Gov't obligations: (a) U.S. and instrumentalities				
(b) State, subdivisions thereof, etc.		131		
5 Other current assets (attach schedule)				
6 Loans to stockholders				
7 Mortgage and real estate loans				
8 Other investments (attach schedule)	99160		70 118	
9 Buildings and other fixed depreciable assets	36759	62361	43 0~6	~7 0~6
(a) Less accumulated depreciation				
10 Depletable assets				
(a) Less accumulated depletion		1~ 000		1~ 000
11 Land (net of any amortization)				
12 Intangible assets (amortizable only)				
(a) Less accumulated amortization		1~		1~
13 Other assets (attach schedule) Deposit		39~ 5~		40 5~~
14 Total assets				
LIABILITIES AND CAPITAL				
15 Accounts payable		55 ~35		79 3~5
16 Mtges., notes, bonds payable in less than 1 yr.		1~ 000		~0 ~~0
17 Other current liabilities (attach schedule) Taxes (A)		5 09~		3 54~
18 Loans from stockholders				
19 Mtges., notes, bonds payable in 1 yr. or more		9~ 000		9~ 4~~
20 Other liabilities (attach schedule)		57, 000		65 000
21 Capital stock: (a) Preferred stock	40 000	40 000	40 000	40 000
(b) Common stock				
22 Paid-in or capital surplus (attach reconciliation)				
23 Retained earnings—Appropriated (attach sch.)				
24 Retained earnings—Unappropriated		1~ 49~		95 9~~
25 Less cost of treasury stock		( )		( )
26 Total liabilities and capital		39~ 6~~		40~ 5~~

Schedule M-1—RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN

1 Net income per books	(~055)	(37,043)	
2 Federal income tax	5~33		
3 Excess of capital losses over capital gains			
4 Taxable income not recorded on books this year (itemize)			
5 Expenses recorded on books this year not deducted on this return (itemize)			
(a) Depreciation $			
(b) Depletion $			
6 Total of lines 1 through 5	(5~ 5~0)		
7 Income recorded on books this year not included in this return (itemize)			
(a) Nontaxable interest $			
8 Deductions in this tax return not charged against book income this year (itemize)			
(a) Depreciation $			
(b) Depletion $			
9 Total of lines 7 and 8			
10 Income (line 28, page 1)—line 6 less 9		(31 C ~09	

Schedule M-2—ANALYSIS OF UNAPPROPRIATED RETAINED EARNINGS PER BOOKS (line 24, page 4)

1 Balance at beginning of year	1~9 49~	5 Distributions: (a) Cash	
2 Net income per books	(~055) (37 043)	(b) Stock	
3 Other increases (itemize) Collection of Taxes Rec. Acc	6, ~06	(c) Property Acc. Taxes Rec. Acc.	~ 62~
		6 Other decreases (itemize)	
4 Total of lines 1, 2, and 3		7 Total of lines 5 and 6	
		8 Balance at end of year (line 4 less 7)	95 9~~

Exhibit B, Annexed to Affidavit of Barry I. Fredericks—Amended Corporate Income Tax Return for 1968.

AMENDED

U.S. Corporation Income Tax Return

For calendar year 1968 or other taxable year beginning _____ 1968, ending _____ 19__
(PLEASE TYPE OR PRINT)

1968

Name: DELECT MERCHANDISING CORP

Number and street: 76 BLANCHARD ST.

City or town, State, and ZIP code: NEWARK N.J.

E Employer identification No.

F County in which located

G Enter total assets from line 15, column (d), Schedule L (See instruction N)

IMPORTANT—All applicable lines and schedules must be filed in. If the lines on the schedules are not sufficient, see instruction N.

GROSS INCOME

1	Gross receipts or gross sales _____ Less: Returns and allowances _____	1,741,058
2	Less: Cost of goods sold (Schedule A) and/or operations (attach schedule)	1,207,857
3	Gross profit	533,201
4	Dividends (Schedule C)	
5	Interest on obligations of the United States and U.S. instrumentalities	
6	Other interest	
7	Gross rents	
8	Gross royalties	
9	Net gains (losses)—(separate Schedule D)	
10	Other income (attach schedule)	
11	TOTAL income—Add lines 3 through 10	533,201

DEDUCTIONS

12	Compensation of officers (Schedule E)	115,560
13	Salaries and wages (not deducted elsewhere)	
14	Repairs (do not include capital expenditures)	
15	Bad debts (Schedule F if reserve method is used)	
16	Rents	18000
17	Taxes (attach schedule)	25559
18	Interest	4067
19	Contributions (attach schedule—see instructions for limitation)	363
20	Casualty or theft losses (attach schedule)	
21	Amortization (attach schedule)	
22	Depreciation (Schedule G)	6063
23	Depletion	
24	Advertising	799
25	(a) Pension, profit sharing, stock bonus, annuity plans (attach Form 2950)	25369
	(b) Other employee benefit plans (see instructions)	
26	Other deductions (attach schedule)	45,171
27	TOTAL deductions on lines 12 through 26	410900
28	Taxable income before net operating loss deduction and special deductions (line 11 less line 27)	122,301
29	Less: (a) Net operating loss deduction (see instructions—attach schedule)	
	(b) Special deductions (Schedule I)	
30	Taxable income (line 28 less line 29)	122,301

31	TOTAL TAX (Schedule J)		51,374
32	Credits: (a) Tax deposited—Form 7004 application for extension (attach copy). TAX on ORIGINAL RETURN	15,306	
	(b) 1968 estimated tax payments (include 1967 overpayment allowed as a credit—do not include any "quick refund" of overpayment of 1968 estimated tax applied for on Form 4466)		
	(c) Credit from regulated investment companies (attach Form 2439)		
	(d) Credit for U.S. tax on lubricating oil and fuel oil (attach Form 4136)		15306
33	TAX DUE (line 31 less line 32). See instruction G for tax deposit system		36068
34	OVERPAYMENT (line 32 less line 31)		
35	Enter amount of line 34 you want: Credited to 1969 estimated tax	Refunded	

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than the taxpayer, his declaration is based on all information of which he has any knowledge.

COPY

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Schedule A—COST OF GOODS SOLD (See instruction 2)

1 Inventory at beginning of year	[illegible]
2 Merchandise bought for manufacture or sale	[illegible]
3 Salaries and wages	[illegible]
4 Other costs (attach schedule)	[illegible]
5 Total	[illegible]
6 Less inventory at end of year	[illegible]
7 Cost of goods sold—Enter on line 2, page 1	[illegible]

Method of inventory valuation C or M

Was there any substantial change in the manner of determining quantities, costs, or valuations between opening and closing inventory? Yes ☐ No ☒ If "Yes," attach explanation.

Schedule C—DIVIDENDS (See instruction 4)

1 Domestic corporations subject to 85% deduction	
2 Certain preferred stock of public utilities	
3 Foreign corporations subject to 85% deduction	
4 Dividends from wholly-owned foreign subsidiaries subject to 100% deduction (section 245(b))	
5 Other dividends from foreign corporations	
6 Income from controlled foreign corporations (attach Form 5646)	
7 Foreign dividend gross-up (section 78)	
8 Qualifying dividends from affiliated groups (section 243(b))	
9 Other	
10 Total—Enter here and on line 4, page 1	

Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

1. Name of officer	2. Social security number	3. Title	4. Time devoted to business	Percent of corporation stock owned: 5. Common	6. Preferred	7. Amount of compensation	8. Expense account allowances
[illegible]						[illegible]	

Total compensation of officers—Enter here and on line 12, page 1 [illegible]

Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 15)

1. Year	2. Trade notes and accounts receivable at end of year	3. Sales account	Amount taken to reserve: 4. Current year's provision	5. Recoveries	6. Amount charged against reserve	7. Reserve for bad debts at end of year
1963						
1964						
1965						
1966						
1967						
1968						

Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13: Make no entry in column 2, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

1. Description of property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Method of computing depreciation	6. Life or rate	7. Depreciation for this year
1 Total additional first year depreciation (do not include in items below)						
Buildings	[illegible]	[illegible]	[illegible]	S L	[illegible]	[illegible]
Furniture and fixtures						
Transportation equipment	[illegible]	[illegible]	[illegible]	S L	[illegible]	[illegible]
Machinery and other equipment	[illegible]	[illegible]	[illegible]	S L	[illegible]	[illegible]
Other (specify)	[illegible]	[illegible]	[illegible]	S L	[illegible]	[illegible]
2 Totals		[illegible]				[illegible]
3 Less amount of depreciation claimed in Schedule A and elsewhere on return						[illegible]
4 Balance—Enter here and on line 22, page 1						[illegible]

Schedule H—SUMMARY OF DEPRECIATION

	Straight line	Declining balance	Sum of the years-digits	Units of production	Asset guideline period (section 167)	Other (specify)	Total
1 Items in Parts I and II of Schedule G	[illegible]						[illegible]
2 Other							

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

12 Total tax—Add lines 9, 10, and 11. Enter here and on line 31, page 1 . . . . . 1156.37

Schedule K—RECORD OF FORM 503 FEDERAL TAX DEPOSITS (List deposits in order of date paid)

Serial number of Form 503	Date of deposit	Amount	Serial number of Form 503	Date of deposit	Amount	Serial number of Form 503	Date of deposit	Amount
278	7/31/68	500.00	13249					
283	12/31/68	500.00	26510					
220	3/12/69	156.37	32962					

H Date incorporated October 26 1954

I (1) Did you at the end of the taxable year own directly or indirectly 50% or more of the voting stock of a domestic corporation? . Yes ☐ No ☐

(2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50% or more of your voting stock? . . . . . Yes ☐ No ☐

(For rules of attribution, see section 267(c).)

If the answer to (1) or (2) is "Yes," attach a schedule showing:
(a) name, address, and identifying number; and
(b) percentage owned.

If the answer to (1) above is "Yes," also show the taxable income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

J Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951? Yes ☐ No ☐. If "Yes," enter the aggregate gross dollar amount billed during the year. ▸ _____

K Did you claim a deduction for expenses connected with: Yes No

(1) Entertainment facility (boat, resort, ranch, etc.) . . ☐ ☒ 24(a)

(2) Living accommodations (except employees on business) . . . . . ☐ ☒ 24(a)

(3) Employees' families at conventions or meetings . . ☐ ☒ 24(a)

(4) Employee or family vacations not reported on Form W-2 . . . . . ☐ ☒ 24(a)

L Taxable income (or loss) from trade or business, Form 1120, for the 1965 _____ 1966 _____ 1967 _____

M Refer to page 7 of instructions and state the principal
Business activity ▸ Publishing & Distributing
Product or service ▸

N Were you a member of a controlled group subject to the provisions of
(1) Section 1561? . . . . . Yes ☐ No ☒
(2) Section 1552? . . . . . Yes ☐ No ☒

If answer to (1) or (2) is "Yes," check type of relationship:
(a) parent-subsidiary ☐
(b) brother-sister ☐
(c) combination of (a) and (b) ☐ (see section 1563)

If answer to (2) is "Yes," does section 1562(b)(1)(A) apply (nonapplication of 6% additional tax under section 1562)? . Yes ☐ No ☐

O Were you liable for filing Forms 1065 and 1099 or 1087 for the calendar year 1968? . . . . . Yes ☐ No ☐

If "Yes," where were they filed? _____

P Were you a U.S. shareholder of any controlled foreign corporation? Yes ☐ No ☐ (See sections 951 and 957.) If "Yes," attach Form 3646 for each such corporation.

Q Did you pay dividends (other than stock dividends and distributions in exchange for stock) during the taxable year which you considered to be partially or wholly nontaxable to shareholders? Yes ☐ No ☒ (See sections 301 and 316.) If this is a consolidated return, answer here for parent corporation and on Form 851, Affiliations Schedule, for each subsidiary.

R Did you ever declare a stock dividend? . . . . Yes ☐ No ☐

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Schedule J—Tax Computation

1 (a) 85% of line 1, Schedule C . . . . . .
(b) 85.102% of line 2, Schedule C (for taxable years ending after June 30, 1969, see instructions) . . . . . .
(c) 85% of line 3, Schedule C . . . . . .
(d) 100% of line 4, Schedule C . . . . . .
2 Total—(May not exceed 85% of line 28, page 1, less the sum of lines 3 and 5 of this schedule). The 85% limitation does not apply to a year in which a net operating loss occurs . . . . . .
3 100% of line 8, Schedule C . . . . . .
4 Dividends paid on certain preferred stock of public utilities (see instructions) . . . . . .
5 Western Hemisphere trade corporations (see instructions) . . . . . .
6 Total special deductions—Add lines 2 through 5. Enter here and on line 29(b), page 1 . . . . . .

Schedule J—TAX COMPUTATION (For taxable years ending after June 30, 1969, see page 6 of instructions)

1 Taxable income (line 30, page 1) 1 52 301
2 Surtax exemption (line 1, $25,000, or amount apportioned under section 1561, whichever is lesser) 2 25 000
3 Line 1 less line 2 . . . . . 3 27 301
4 (a) 22% of line 1 . . . . . 4a 5 406 5 948
(b) 26% of line 3 . . . . . 4b 46,704
(c) If multiple surtax exemption is elected under section 1562, enter 6% of line 2 . . . . . 4c
5 (a) Income tax (line 4, or line 24 of separate Schedule D, whichever is lesser) 5a 46,704 4670 51 374
(b) Tax Surcharge—10% of line 5(a) 5b
6 Foreign tax credit (attach Form 1118) 6 51 374
7 Line 5 less line 6 . . . . . 7 51 374
8 Investment credit (attach Form 3468) 8
9 Line 7 less line 6 . . . . . 9 51 374
10 (a) Personal holding company tax (attach Schedule 1120 PH) 10a
(b) Tax Surcharge—10% of line 10(a) 10b
11 Tax from recomputing a prior year investment credit (attach computation) 11
12 Total Tax—Add lines 9, 10, and 11. Enter here and on line 31, page 1 . . . . . 12 51374

Schedule K—RECORD OF FORM 503 FEDERAL TAX DEPOSITS (List deposits in order of date paid)

Serial number of Form 503	Date of deposit	Amount	Serial number of Form 503	Date of deposit	Amount	Serial number of Form 503	Date of deposit	Amount

H Date incorporated

I (1) Did you at the end of the taxable year own directly or indirectly 50% or more of the voting stock of a domestic corporation? Yes ☐ No ☐

(2) Did any corporation, individual, partnership, trust, or association at the end of the taxable year own directly or indirectly 50% or more of your voting stock? . . . . . Yes ☐ No ☐

(For rules of attribution, see section 267(c).)

If the answer to (1) or (2) is "Yes," attach a schedule showing:
(a) name, address, and identifying number; and
(b) percentage owned.

If the answer to (1) above is "Yes," also show the taxable income (or loss) from line 30, page 1, Form 1120 of such corporation for the taxable year ending with or within your taxable year.

J Did you have any contracts or subcontracts subject to the Renegotiation Act of 1951? Yes ☐ No ☐ If "Yes," enter the aggregate gross dollar amount billed during the year.

K Did you claim a deduction for expenses connected with: Yes No

(1) Entertainment facility (boat, resort, ranch, etc.) . . ☐ ☐
(2) Living accommodations (except employees on business) . . . . . ☐ ☐
(3) Employees' families at conventions or meetings . . ☐ ☐
(4) Employee or family vacations not reported on Form W-2 . . . . . ☐ ☐

L Taxable income (or loss) from line 30, page 1, Form 1120 for: 1968 . . . . . 1969 . . . . . 1967 . . . . .

M Refer to page 7 of instructions and state the principal:

Business activity

Product or service

N Were you a member of a controlled group subject to the provisions of:
(1) Section 1561? . . . . . Yes ☐ No ☐
(2) Section 1562? . . . . . Yes ☐ No ☐

If answer to (1) or (2) is "Yes," check type of relationship:
(a) parent-subsidiary ☐
(b) brother-sister ☐
(c) combination of (a) and (b) ☐ (see section 1563)

If answer to (2) is "Yes," does section 1562(b)(1)(A) apply (nonapplication of 6% additional tax under section 1562)? Yes ☐ No ☐

O Were you liable for filing Forms 1096 and 1099 or 1087 for the calendar year 1968? . . . . . Yes ☐ No ☐

If "Yes," where were they filed?

P Were you a U.S. shareholder of any controlled foreign corporation? Yes ☐ No ☐. (See sections 951 and 957.) If "Yes," attach Forms 5646 for each such corporation.

Q Did you pay dividends (other than stock dividends and distributions in exchange for stock) during the taxable year which you considered to be partially or wholly nontaxable to shareholders? Yes ☐ No ☐. (See sections 301 and 316.) If this is a consolidated return, answer here for parent corporation and on Form 851, Affiliations Schedule, for each subsidiary.

R Did you ever declare a stock dividend? . . . . Yes ☐ No ☐

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Taxpayer: Welsh Dredging Co. For the Year Ended 12/31/69

Name & Address _____ Social Security No. _____

Total Schedule C Taxes		
Payroll Taxes	9961.12	
Real Estate	11742.63	
State Franchise Taxes	1433.76	
City Business Taxes	1402.10	
Personal Tax	911.00	
Water	6261.50	
Misc.	1962.00	34,174.11
Schedule of Deductions		
Travel & Entertainment	11391.00	
Freight & Express	4931.00	
Advertising & Auto Expense	4899.75	
Depreciation & Rent	11401.31	
Insurance	6402.00	
Telephone	6745.52	
Legal & Accounting	6340.00	
Interest & Bank Fees	11033.71	
Office Expense & Supplies	4901.00	
Repairs	5700	
Construction Costs	4750	
Union Dues	4550	
Hospitalization Insurance	4916.50	
Pension Expense	4377.50	
Bonding & Expense & Interest	3331.61	
Welfare Fund & PCF	6702.50	112,961.00
COMMISSIONS E. LIROFF	3-676.	
COMMISSIONS M. WINDELL	3-676.	
		-1516.

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

1. Name of officer	2. Social security number	3. Title	4. Time devoted to business	Percent of corporation stock owned: 5. Common	5. Preferred	7. Amount of compensation	8. Expense account allowances
[illegible]						[illegible].00	
[illegible]						26000.00	
[illegible]						[illegible].00	
[illegible]						27560.00	
Total compensation of officers—Enter here and on line 12, page 1						[illegible]560.00	

Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 15)

Year	2. Trade notes and accounts receivable outstanding at end of year	3. Sales on account	Amount added to reserve: 4. Current year's provision	5. Recoveries	6. Amount charged against reserve	7. Reserve for bad debts at end of year
1963						
1964						
1965						
1966						
1967						
1968						

Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13: Make no entry in column 2, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

1. Group and guideline class or description of property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Method of computing depreciation	6. Life or rate	7. Depreciation for this year
Total additional first-year depreciation (do not include in items below)						
Buildings	1963 [illegible]	2140.00	1070.75	S L	15	214.00
Furniture and fixtures						
Transportation equipment	1965	6159.09	2758.96	S L	10%	551.82
Machinery and other equipment						
Other (specify)						
Leasehold Improvements	1959	6754.00	2797.35	S L	10%	382.00
12 Totals		21893.92				1147.82
13 Less amount of depreciation claimed in Schedule A and elsewhere on return						1147.82
14 Balance—Enter here and on line 22, page 1						

Schedule H—SUMMARY OF DEPRECIATION

	Straight line	Declining balance	Sum of the years-digits	Units of production	Additional first-year (section 179)	Other (specify)	Total
1 Under Rev. Procs. 62-21 and 65-13	1147.82						1147.82
2 Other							

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

DELCET MERCHANDISING CORP
U.S. CORPORATE TAX RETURN
1963

Cost of Goods Sold					
	Beginning Inventory				124879
	Purchases				1010704
	Salaries				179940
					1315524
	Less Ending Inventory				107664
	Cost of Goods Sold				1207857
Other:					
	Payroll				
	Real Estate				
	Other				
Other Deductions					
	Travel & Entertainment				
	Freight & Express				
	Delivery & Auto Insurance				
	Telephone				
	Legal & Accg.				
	Postage & Parcel				
	Carpet Cleaning				
	Bldg Exp. & Maint.				

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Schedule A—Cost of Goods (See instructions 2)

1 Inventory at beginning of year	[illegible]
2 Merchandise bought for manufacture or sale	[illegible]
3 Salaries and wages	[illegible]
4 Other costs (attach schedule)	[illegible]
5 Total	[illegible]
6 Less inventory at end of year	[illegible]
7 Cost of goods sold—Enter on line 2, page 1	[illegible]

Method of inventory valuation C OR M

Was there any substantial change in the manner of determining quantities, costs, or valuations between opening and closing inventory? Yes ☐ No ☒. If "Yes," attach explanation.

Schedule C—Dividends (See instructions 4)

1 Domestic corporations subject to 85% deduction	
2 Certain preferred stock of public utilities	
3 Foreign corporations subject to 85% deduction	
4 Dividends from wholly owned foreign subsidiaries subject to 100% deduction (section 245(b))	
5 Other dividends from foreign corporations	
6 Income from controlled foreign corporations (attach Form 3646)	
7 Foreign dividend gross-up (section 78)	
8 Qualifying dividends from affiliated groups (section 243(b))	
9 Other	
10 Total—Enter here and on line 4, page 1	

Schedule E—COMPENSATION OF OFFICERS (See instruction 12)

1. Name of officer	2. Social security number	3. Title	4. Time devoted to business	5. Percent of corporation stock owned: a. Common	b. Preferred	6. Amount of compensation	7. Expense account allowances
[illegible]						[illegible]	
[illegible]						[illegible]	
[illegible]						[illegible]	
[illegible]						[illegible]	
[illegible]							
Total compensation of officers—Enter here and on line 12, page 1						[illegible]	

Schedule F—BAD DEBTS—RESERVE METHOD (See instruction 15)

1. Year	2. Trade notes and accounts receivable outstanding at end of year	3. Sales on account	4. Current year's provision	5. Recoveries	6. Amounts charging off against reserve	7. Reserve for bad debts at end of year
1963						
1964						
1965						
1966						
1967						
1968						

Schedule G—DEPRECIATION (See instructions for Schedule G)

Taxpayers using Revenue Procedures 62-21 and 65-13, make no entry in column 2, enter the cost or other basis of assets held at end of year in column 3, and enter the accumulated depreciation at end of year in column 4.

1. Group and subclass code or enter kind of property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed or allowable in prior years	5. Method of computing depreciation	6. Life or rate	7. Depreciation for this year
1 Total additional first year depreciation (do not include in items below)						
Buildings	1960-65	2240.00	1040.00	S L	10%	240.00
Furniture and fixtures						
Transportation equipment						
Machinery and other equipment	1960	61200.00	39200.00	S L	10%	5500.00
Other (specify)						
Leasehold Improvements	1957	6700.00	2700.15	S L	10%	399.85
2 Totals		70140.00				6139.85
3 Less amount of depreciation claimed in Schedule A and elsewhere on return						6139.85
4 Balance—Enter here and on line 22, page 1						

Schedule H—SUMMARY OF DEPRECIATION

	Description	Business balance	Sum of the years digits	Units of production	Additional first year (section 179)	Other (specify)	Total
1 Write-Ins Prior 1962 and after							6139.70
2 Other	6139.70						

Exhibit B, Annexed to Affidavit of Barry I. Fredericks

Form 1120 (1969) — Schedule L—BALANCE SHEETS — [illegible]

ASSETS	Beginning of taxable year (A) Amount	(B) Total	End of taxable year (C) Amount	(D) Total
1 Cash		5003		3763
2 Trade notes and accounts receivable	178437		185461	
(a) Less allowance for bad debts		178437		185461
3 Inventories		134579		107664
4 Gov't obligations: (1) U.S. and instrumentalities				
(b) State, subdivisions thereof, etc.	SUCCESSIVE YEARS			
5 Other current assets (attach schedule)				40000
6 Loans to stockholders				20000
7 Mortgage and real estate loans				
8 Other investments (attach schedule)				
9 Buildings and other fixed depreciable assets	70114		70114	
(a) Less accumulated depreciation	43028	27086	49091	21023
10 Depletable assets				
(a) Less accumulated depletion				
11 Land (net of any amortization)		120000		165000
12 Intangible assets (amortizable only)				
(a) Less accumulated amortization				
13 Other assets (attach schedule)		125		336
14 Total assets		425503		543747
LIABILITIES AND STOCKHOLDERS' EQUITY				
15 Accounts payable		79345		113449
16 Mtges., notes, bonds payable in less than 1 yr.		25240		
17 Other current liabilities (attach schedule)		3544		11623
18 Loans from stockholders				
19 Mtges., notes, bonds payable in 1 yr. or more		93424		94454
20 Other liabilities (attach schedule)		54000		70478
21 Capital stock: (a) Preferred stock	40000	40000	80000	80000
(b) Common stock				
22 Paid-in or capital surplus (attach reconciliation)				
23 Retained earnings—Appropriated (attach sch.)				
24 Retained earnings—Unappropriated		95977		173703
25 Less cost of treasury stock		( )		( )
26 Total liabilities and stockholders' equity		425503		543747

Schedule M-1—RECONCILIATION OF INCOME PER BOOKS WITH INCOME PER RETURN

1 Net income per books	117391	7 Income recorded on books this year not included in this return (itemize)	
2 Federal income tax	9910	(a) Tax-exempt interest $	
3 Excess of capital losses over capital gains			
4 Taxable income not recorded on books this year (itemize)		8 Deductions in this tax return not charged against book income this year (itemize)	
		(a) Depreciation $	
5 Expenses recorded on books this year not deducted in this return (itemize)		(b) Depletion $	
(a) Depreciation $			
(b) Depletion $			
6 Total of lines 1 through 5	127301	9 Total of lines 7 and 8	
		10 Income (line 28, page 1)—line 6 less 9	127301

Schedule M-2—ANALYSIS OF UNAPPROPRIATED RETAINED EARNINGS PER BOOKS (Line 24 above)

1 Balance at beginning of year	95977	5 Distributions: (a) Cash	
2 Net income per books	117391	(b) Stock	
3 Other increases (itemize)		(c) Property	
		6 Other decreases (itemize) Add. P.C.S.	35,155
4 Total of lines 1, 2, and 3		7 Total of lines 5 and 6	
		8 Balance at end of year (line 4 less 7)	173703

Exhibit C, Annexed to Affidavit of Barry I. Fredericks—Notice of Deficiency, Dated December 14, 1979.

Internal Revenue Service
Regional Commissioner

Department of the Treasury

Dated: DEC 14 1979
Deleet Merchandising Corp.
20 Blanchard Street
Newark, New Jersey 07102

Person to Contact:
Philip J. Glackin
Contact Telephone Number:
201-643-6200

	Deficiency	
	Tax	*Addition to Tax Section 6653(b) IRC*
December 31, 1966	$ 35,934.54	$19,586.84
December 31, 1967	23,243.00	13,856.00
December 31, 1968	36,316.01	39,275.82
December 31, 1969	100,218.50	92,371.75
December 31, 1970	126,235.41	60,117.71
December 31, 1971	33,195.58	57,215.16
December 31, 1972	7,544.48	-0-

Gentlemen:

We have determined that there is deficiency (increase) in your income tax as shown above. This letter is a NOTICE OF DEFICIENCY sent to you as required by law. The enclosed statement shows how we figured the deficiency.

If you want to contest this determination in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the amount of your tax. The petition should be filed with the

Exhibit C, Annexed to Affidavit of Barry I. Fredericks

United States Tax Court. 400 Second Street NW., Washington, DC 20217, and the copy of this letter should be attached to the petition. The time in which you must file a petition with the Court (90 or 150 days as the case may be) is fixed by law and *the Court cannot consider your case if your petition is filed late.* If this letter is addressed to both a husband and wife, and both want to petition the Tax Court, *both* must sign the petition or each must file a separate, signed petition. You can get a copy of the rules for filing a petition by writing to the Clerk of the United States Tax Court, at the address shown in this paragraph.

If you decide not to file a petition with the Tax Court, we would appreciate it if you would sign and return the enclosed waiver form. This will permit us to charge your account quickly and will limit the accumulation of interest. The enclosed addressed envelope is for your convenience. If you decide not to sign and return the waiver and you do not timely petition the Tax Court, the law requires us to bill you after 90 days from the above mailing date of this letter (150 days if this letter is addressed to you outside the United States).

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

JEROME HURTZ
Commissioner
By (Signed) L. DICKSTEIN
(Illegible) Appeals Office

Enclosures:
Copy of this letter
Statement
Waiver
Envelope

Memorandum of the District Court.

UNITED STATES DISTRICT COURT
Room 411, U.S. Post Office Building
Newark, New Jersey 07102
FTS #(0) 341-2517

Vincent P. Biunno (201) 645-2417
Judge (201) 642-2451

[Filed December 21, 1981]

MEMORANDUM

Re: Deleet Mfg. Co. v. United States,
Civ. 80-26

Plaintiff has filed a motion for summary judgment returnable December 13, 1981. The motion is accompanied by a brief arguing the point that deficiency assessments dated December 14, 1979, in respect to taxes for 1967 and 1968 are barred by the statute of limitations.

The brief commendably lists a series of seven facts as to which it is claimed there is no geniune issue. In reviewing them, however, the court raises a number of questions now so that the parties can be prepared to address them at argument, or before.

1. Fact 1 says that the original 1967 return showed a tax due of $5,233.05, while Fact 3 says that after the amended return was filed for 1967, there was a request for refund of $6,206. *Query*: can a refund claim exceed the tax paid?

2. Fact 1 says the original 1968 return showed tax due of $36,608., which was paid. Fact 3 says that the amended 1968 return showed $36,314.01 due for 1968 and that it was also paid. Fact 5 says that a claim for refund for 1968

was disallowed. *Query*: are all these facts correct? Where is there mention of the 1968 *refund*?

3. Fact 5 says that the December 14, 1979 notice assessed deficiencies of taxes for both 1967 and 1968, and penalties as well. Fact 6 says that the assessments were paid on December 27, 1979. Fact 7 says that suit here was begun January 8, 1980. *Query*: can the present suit seek repayment of the amounts paid December 27, 1979 without first filing a refund claim or claims? See I.R.C. §7422(a) and (c), and Reg. §301.6532-1(a).

4. Are any of the provisions of 26 USC §§1311 *et seq.* applicable to toll any otherwise applicable statute of limitations? These are the present 1954 Code counterparts of the former §3801 of the 1939 Code.

November 30, 1981

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk
xc: Fredericks & Messinger, Esqs.
Anne Singer, AUSA

Affidavit of Edward Sussman.

State of New York,
County of New York, ss:

EDWARD SUSSMAN, being duly sworn, deposes and says:

1. I am a member of Goldschmidt, Fredericks & Oshatz, attorneys for the plaintiff Deleet Merchandising Corporation. Except as hereinafter stated, I am personally familiar with the facts and circumstances set forth and I make this affidavit in reply to the opposition memorandum of the government and in further support of plaintiff's application for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

2. Initially I would point out to the Court that both the original moving papers and the government's opposition contain certain misstatements of fact. These inaccuracies deal with the content of the original and amended tax returns filed by the plaintiff. In order that such mistakes be corrected there is set forth below all of the pertinent information relating thereto:

Year	*Total Tax Due on Original Return*	*Total Tax Due on Amended Return*	*Deficiency Alleged By Government*
1967	$ 6,206.49	Refund Requested	$38,604.00
1968	$11,063.83	$51,374.00	$75,589.83

3. The deficiencies assessed were paid by plaintiff and it is these amounts which are the subject of the suit. There is

no dispute that plaintiff's original returns were timely filed nor is there any dispute that plaintiff's amended returns were filed in August, 1973. Finally, there is no issue that the government did not make any assessment until December 14, 1979, more than six years subsequent to the filing of plaintiff's amended return. Having unduly delayed its own administrative determination for a prolonged period and thereby having been caught short by the decisions of both the Tenth Circuit Court of Appeals and The Tax Court, the government now asserts that this Court should deny judgment to plaintiff by arguing two totally inconsistent positions. On the one hand, the government contends that because plaintiff did not specifically assert the limitation period in its claim for refund this Court may not consider it. On the other hand, the government argues that on the merits, it adheres to the position it argued in the cases decided adversely to it. Differently stated, the government's position is that it would deny a refund claim based on the expiration of the limitation period but absent such a formality, this Court should not rule on the legal issue presented. Stripped of excess verbiage, the government's position is that plaintiff must undertake a totally futile gesture for no logical reason.

4. Annexed hereto as Exhibits A and B are copies of amended claims for refund which plaintiff has caused to be forwarded to the Internal Revenue Service. As may be seen, these claims specifically allege the passage of the limitations period as a basis for refund. It is anticipated that in response to this development, the government will contend that it is entitled to delay action for a period of six months under Internal Revenue Code section §7422(a). Again no logical reason supports the government's position.

5. Accompanying this affidavit is plaintiff's reply memorandum of law. As may be seen therefrom, the government's reliance on the failure of plaintiff to specifically allege in its claim for refund the statutory limitation of §6501(a) of the Internal Revenue Code is misplaced. The underlying purpose of this administrative rule is to enable the government to analyze the taxpayer's basis for refund and to limit the issues to be litigated. In the instant case, there is absolutely no doubt that the government must reject plaintiff's limitation claim.

6. Moreover, it is not at all clear that the administrative regulation relied upon by the government has any application to the case at bar. The insant lawsuit was instituted on or about January 8, 1980, prior to the decision by the Tenth Circuit Court of Appeals in *Dowell v. Commissioner*, 614 F.2d 1263. Subsequently, the Tax Court adopted the rationale of the Tenth Circuit. Clearly, the government was at all times aware of the implications of these decisions on the case at bar. Thus, there cannot be any element of surprise or unfairness with respect to the instant motion.

WHEREFORE, deponent respectfully requests that this Court grant plaintiff's application in all respects.

(Sworn to by Edward Sussman, December 9, 1981.)

Order for Summary Judgment.

Plaintiff having moved the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and said motion having regularly come on to be heard at on the 14th day of December, 1981, and the Court having found that plaintiff is entitled to judgment as a matter of law, it is

ORDERED that plaintiff's motion is in all respects granted and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff and against defendant in the sum of One Hundred Fourteen Thousand One Hundred Ninety-Three Dollars and Eighty-Three Cents ($114, 193.83) together with interest and costs as provided by law.

12/22/81

(Illegible)
U.S.D.J.

Original Filed
Dec 22 1981
Angelo W. Locascio, Clerk

Notice of Appeal.

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on the 22nd day of December, 1981.

W. HUNT DUMONT
United States Attorney

By: ANNE C. SINGER
Assistant United States Attorney

Filed
Feb 18 1982
4:45 PM
Angelo W. Locascio